

PAUL FINKELMAN, PH.D.

December 17, 2021

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN

ANTHONY EID, an individual,

Plaintiff,

vs.

Case No. 2:20-cv-11718

Hon. Gershwin A. Drain

Mag. Judge David R. Grand

WAYNE STATE UNIVERSITY, WAYNE

STATE UNIVERSITY SCHOOL OF MEDICINE,

NIKOLINA CAMAJ, MARGIT CHADWELL,

MATT JACKSON, RICHARD S. BAKER, and

R. DARIN ELLIS, in their individual and

official capacities, jointly and severally,

Defendants.

DEPOSITION OF PAUL FINKELMAN, Ph.D.

APPEARING REMOTELY

Friday, December 17, 2021

10:19 a.m.

REPORTED BY:

Cheri L. Poplin, CSR-5132, RPR, CRR

APPEARING REMOTELY FROM WAYNE COUNTY, MICHIGAN

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December 17, 2021

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| <p style="text-align: right;">Page 6</p> <p>1 was in Tulsa, Oklahoma. In the end I was not called 2 as a witness because I moved out of Oklahoma, and when 3 the case took place, you know, they had seen no reason 4 to bring me back, so I actually cannot -- the 5 defendant was the Miller Museum of Jewish History in 6 Tulsa, Oklahoma, and I literally -- I mean, this is 7 more than -- this is about 20 years ago or 15 years 8 ago and I just don't remember the name. If it's 9 absolutely necessary, I will dig that out somewhere. 10 Again -- 11 Q. Yeah. So these were all preludes to -- just wanted to 12 get an understanding of what kind of experience you've 13 had in a setting like this, because one of the things 14 I don't want you to do is to speculate or to guess in 15 answering any of my questions this morning, so if you 16 don't remember or don't know, it is okay and 17 acceptable to give that answer, and if we need any 18 additional follow-up or anything like that, Mr. Flores 19 and I can discuss that, but it won't be necessary for 20 today. 21 A. Okay. I understand. 22 Q. If you don't understand any questions that I've asked, 23 if they're poorly formulated, this can be a pretty 24 dense subject matter, so just ask me to rephrase or 25 tell me that you don't understand the question and</p> | <p style="text-align: right;">Page 8</p> <p>1 agency, Wayne State University at Wayne State medical 2 school, that he was denied any right of confrontation, 3 that he was denied notice of what he was charged with, 4 that at one point one of the people who were deposed, 5 a Ms. Camaj, said that there wasn't a complaint here 6 and so she didn't have to give him notice according to 7 the student rules, but, in fact, according to the 8 rules of the university, the university did not follow 9 a number of its own due process rules and protections 10 for people like Mr. Eid, starting with the fact they 11 did not give him enough notice to come to a meeting to 12 which he was summoned, they did not give him the 13 material he was promised according to the student 14 rules in being summoned to that meeting, and when he 15 specifically asked for information, as best I can 16 tell, unless there's something in the record I -- that 17 I didn't see, Ms. Camaj did not, in fact, even reply 18 to his email asking for the information that he 19 wanted. She then in her deposition said that she 20 didn't need to do that because there was no charge 21 against him, but three days later or four days later 22 she referred to this as a case when she submitted her 23 report to somebody -- to one of her superiors, so in 24 that sense there seems to be -- my conclusion is 25 there's a tremendous amount of double-talk coming out</p> |
| <p style="text-align: right;">Page 7</p> <p>1 I'll do my best to reformulate it. 2 A. All right. 3 Q. And if you don't do that, I will assume that it at 4 least makes sense enough to you that you're able to 5 give an answer. 6 A. Okay. 7 Q. And as with all remote depositions, there are some 8 possibilities of some cross-talk, overlap, things like 9 that. We'll try to do our best not to talk over each 10 other, but if that happens, please just let me know 11 and I will, you know, try to pause and let you finish 12 and then hopefully you will do the same. 13 A. Thank you. 14 Q. Okay. So please, Dr. Finkelman, if you could, 15 identify for me all the expert opinions that you have 16 reached in this matter. 17 A. All of them? 18 Q. Correct. 19 A. Okay. I sent you a 51-page expert report and so I 20 have covered a lot of ground. The -- my general view 21 is, and, again, I would have to go through the 51-page 22 document paragraph by paragraph in case I missed 23 something, but generally I believe that the plaintiff 24 in this case, Mr. Eid, was not granted due process 25 protections by the State of Michigan through its</p> | <p style="text-align: right;">Page 9</p> <p>1 of Ms. Camaj and other people involved. 2 Next -- 3 Q. Well -- 4 A. You asked me for all of it. You have to let me 5 finish. Okay? 6 Q. I will let you finish. I just wanted to cut in here 7 and just say we will certainly go over everything 8 that's in your report. So I don't want you to 9 think -- and I accept that you are reserving your 10 right to rely on everything that's in your report, and 11 so it wasn't my intention to ask for you to give me an 12 exhaustive recitation of your report. Just your -- if 13 you could, just summarize your baseline opinion or 14 opinions, and if there are subsidiary points -- 15 A. That's fine. 16 Q. If there are subsidiary points subsumed within those, 17 I acknowledge that you have -- you think that, and we 18 will cover all of those subsidiary points. I promise 19 you. I just was hoping -- I was asking for maybe just 20 a thesis statement of your opinion or opinions without 21 waiving your right to expand on those later on, and I 22 assure you we will -- 23 A. That's fine. I thought I was answering your question 24 where you asked me to cover it all. Okay. So my -- 25 my summary opinion is that the university has denied</p> |

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| <p style="text-align: right;">Page 10</p> <p>1 Mr. Eid a full plethora range of due process 2 protections, right to know what he's being charging 3 with, right to see evidence, due process right to 4 confront witnesses, right to have an attorney, and 5 that the university has, in fact, failed to follow 6 many, many of its own rules in this process and that 7 the university did not give him an adequate right to 8 appeal, including refusing to tell him what he was 9 actually charged with and why he was being expelled 10 from medical school, and when asked about this, he was 11 told that the -- by the chair of the promotions 12 committee that they could not tell him what, in fact, 13 was the reason for why he was being expelled from 14 school. So it is all about due process and that the 15 right to due process is about as ancient a right in 16 Anglo-American law as we can find going back to at 17 least Magna Carta, and I have given some history of 18 this, and that this right to due process is a 19 fundamental requirement of the State of Michigan under 20 the 14th Amendment which says that no state may deny 21 anyone due process of law. Okay? Does that help you? 22 Q. It does. Outside of the due process clause of the 23 14th Amendment, have you reached any other expert 24 opinions in this case? 25 A. Yeah. I believe that, although I have not developed</p> | <p style="text-align: right;">Page 12</p> <p>1 reasonable degree of certainty? 2 A. No, I have not because I don't have evidence. Again, 3 I don't have -- you know, we're not working from a 4 trial record. We're working from depositions. So I 5 can only respond to the issues that have been raised 6 in deposition and raised in documents and look at 7 those documents, but it does seem clear to me that 8 the -- that there is a prima facie case that he has 9 been denied equal protection by the university. 10 Q. And, Doctor, when you refer to jurisdiction, are you 11 referring to the Wayne State University's 12 jurisdiction -- 13 A. Yes. 14 Q. -- over -- let me just -- let me finish. Let me 15 finish my question first. Sorry. 16 A. I'm sorry. I'm sorry. 17 Q. When you refer to the word "jurisdiction," are you 18 referring to the Wayne State University's jurisdiction 19 over Mr. Eid or over the Court's jurisdiction over 20 this case? 21 A. The Wayne State's jurisdiction over Mr. Eid. 22 Q. Is that a question of interpretation of the school's 23 handbook and bylaws? 24 A. It is based mostly on the statement of Ms. Camaj that 25 the -- that when asked what she did to investigate</p> |
| <p style="text-align: right;">Page 11</p> <p>1 it, that he may also have been denied full protection 2 of the law, which is also a requirement of the 14th 3 Amendment, and I did not go into that in as great of 4 detail, but it seems to me that and in my expert 5 report I -- I make some suggestions about due process 6 issues. I also -- again, I am not an attorney, so I'm 7 not making a legal argument, but as a person who 8 taught in law schools for about 20 years and who has 9 been cited by many, many courts and written an awful 10 lot on constitutional law and legal history, it 11 strikes me that there is even a fundamental question 12 of jurisdiction in this case because, again, 13 Ms. Camaj, and I don't want to go into this in great 14 detail, Ms. Camaj said that the university only has 15 jurisdiction over events which took place on campus or 16 at university events, and as far as I can tell from 17 the record, any of the events that may have led to 18 this issue did -- none of them took place on campus 19 and many of them did not involve -- involve someone 20 who was no longer a student. So yeah, I've reached 21 conclusions. But these are -- these are secondary 22 conclusions to the main issue, which is about due 23 process. 24 Q. Have you in your report reached your conclusion 25 regarding the equal protection clause with any</p> | <p style="text-align: right;">Page 13</p> <p>1 this case she said one of the things she determines is 2 whether when a complaint is made the university has, 3 quote, jurisdiction. That's I believe the term she 4 used. We can check her deposition. And then she went 5 on to give the example that something might have 6 happened off campus and therefore the university did 7 not have any jurisdiction, and so if the university 8 has no jurisdiction to investigate this matter because 9 it did not take place on campus and for much of the 10 matter did not even involve two students, then I would 11 think as a fundamental matter of due process this is 12 not something the university should be handling. The 13 university could have turned it over to the local 14 district attorney, could have turned it over to the 15 police department in Detroit or the Wayne State 16 University Police Department and, in fact, did turn it 17 over. There was a complaint or some action with the 18 Wayne State University Police Department, which 19 declined to investigate. So it strikes me that if 20 there is an issue here in terms of jurisdiction, it 21 may not involve Wayne State University. 22 Q. Thank you. Do I understand you correctly or is it 23 fair to say that your concern with jurisdiction is a 24 subsidiary component of your due process opinion? 25 A. It's -- you can't pull all these apart. I mean,</p> |

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| <p style="text-align: right;">Page 62</p> <p>1 bonus. I'm paid 510 an hour for this work. So if I 2 work -- to make a joke, which I am not, I would say 3 let's continue this a lot longer because I'm getting 4 paid more, but we don't want to do that. I'm joking, 5 and I hope that's clear for the record. So that would 6 be the information you want. 7 In terms of my hours, I have put in 8 60 hours of reading and writing and conversations with 9 attorneys, and I now have two hours of deposition 10 time, including the five or seven or eight minutes it 11 took me to gather all this information, so I've just 12 rounded that up to two hours from ten to 12, although 13 I probably went a little bit over in getting this 14 information. Is that sufficient? 15 Q. Thank you, Doctor. Did I understand you correctly 16 that Ms. Vincent contacted you on October 19th and 17 provided you the Complaint on that date? 18 A. Yes. And I said to her that I could not -- I could 19 not be her expert until I -- until I read the 20 Complaint. 21 Q. Okay. So just in reviewing the transcript that we've 22 got so far and in response to that question that I 23 just asked, I've noticed a few times during our 24 deposition I will ask you a straightforward question 25 and I will get a -- what I consider to be a</p> | <p style="text-align: right;">Page 64</p> <p>1 at? 2 A. I taught at the University of Pittsburgh Law School in 3 the fall of 2017. 4 Q. And what classes did you teach at the University of 5 Pittsburgh Law School? 6 A. I taught -- in the spring of 2017 I taught -- in the 7 spring of 2017 I taught first year constitutional law, 8 and in the fall of 2017 I taught a seminar on -- on 9 civil rights and the constitution. I also taught a 10 course in legal history in the spring of 2017. It may 11 have been a course on the law of slavery or it may 12 have been a general course. I don't remember. 13 MR. FLORES: Excuse me, David. 14 Dr. Finkelman, I'm having trouble hearing 15 you. If you could try and -- 16 THE WITNESS: I'm sorry. Can you hear me 17 better now? 18 MR. FLORES: Yes. If you can stay closer 19 to your microphone. 20 THE WITNESS: I will stay closer to my 21 microphone. Sorry. 22 MR. FLORES: Sorry, David. 23 MR. PORTER: That's okay. I should tell 24 you I have the benefit of having a live transcription 25 here, so if it looks like I'm looking off to the</p> |
| <p style="text-align: right;">Page 63</p> <p>1 non-responsive answer. Now, of course I can't -- 2 excuse me. I cannot tell you how to answer your 3 questions. However, if this continues, we can do one 4 of two things. I can allow you to provide the 5 extended responses that you've been giving and I will 6 then ask my follow-up and I will continue to ask the 7 question that I want an answer to until you finally 8 give it, and if we do that, we may be here longer than 9 seven hours. We will have to go to a court and bring 10 you back. Or you can answer the question that I'm 11 asking you directly and we can streamline this 12 process. Okay? 13 A. Thank you. 14 Q. So you received the Complaint for the first time on 15 October 19th and it was after that date that you 16 agreed to become Mr. Bid's expert; is that correct? 17 A. Yes. 18 Q. Dr. Finkelman, you are not a lawyer; correct? 19 A. Yes. That is correct. 20 Q. You are not a medical doctor; is that correct? 21 A. That is correct. 22 Q. You have previously taught at law schools; is that 23 correct? 24 A. That is correct. 25 Q. What is the most recent law school that you've taught</p> | <p style="text-align: right;">Page 65</p> <p>1 side -- 2 MR. FLORES: I caught that from this 3 morning. Yeah. 4 MR. PORTER: -- I'm trying to read. 5 BY MR. PORTER: 6 Q. Okay. Have you ever taught a class devoted to 7 procedural due process? 8 A. No, I have not. 9 Q. Have you ever taught a class on procedural due process 10 in the medical setting? 11 A. I have never taught in any medical setting. 12 Q. As a professor at a variety of law schools, have you 13 ever sat on a committee in charge of handling 14 complaints of academic misconduct? 15 A. Yes. 16 Q. At what institutions? 17 A. Pardon? I didn't hear your question. 18 Q. At what law schools? 19 A. I taught -- I was on a committee at Hamline Law 20 School. I was involved in these issues, I'm not sure 21 it was actually a committee, at the University of 22 Tulsa Law School. I was involved in issues of this 23 nature at Albany Law School. 24 MR. FLORES: What was the last one, Doctor? 25 A. Albany Law School, Tulsa Law School, and Hamline Law</p> |

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| <p style="text-align: right;">Page 70</p> <p>1 like the writing of a law student, a second year law 2 student, and it didn't seem consistent with the rest 3 of the writing, but while they had searched, and what 4 they did was did a Google search, they had searched 5 and done a Google search and only found this one 6 sentence that was plagiarized. 7 And I said, "Well, how did you do the 8 Google search?" 9 And they said, "We simply put in these 10 whole sentences into Google." 11 I said, "That's not the way to do it." The 12 way to do it is to take the key words of the sentences 13 and say, you know, Smith within five words of Jones, 14 you know, using key words, not those names, and search 15 in a Lexis or Westlaw or HeinOnline or any database, 16 and when they did that, it turned out that a massive 17 amount of the section was plagiarized, and so I 18 unfortunately had to bring this to the dean, and she 19 was brought before the academic -- 20 Q. Thank you. Thank you, Doctor. Any other institutions 21 that you have been a faculty member on have you sat on 22 an academic integrity committee? 23 A. As I said, at Albany Law School I was involved in some 24 academic integrity cases. I was -- 25 Q. Were you involved as a voting member on the committee?</p> | <p style="text-align: right;">Page 72</p> <p>1 A. Well, do you want me to tell you or not? 2 Q. What is it? 3 A. It is that as a faculty member in both Albany and 4 Tulsa, we are required to vote on issues involving 5 whether students are eligible to graduate and whether 6 when they submitted their application for law school 7 they were -- they divulged all criminal activity 8 before they came to law school, and so there were 9 many -- as a voting faculty member, there were many 10 faculty meetings where these issues were discussed 11 where what would happen is a student is applying for 12 the bar and the bar comes back and says, well, you 13 didn't disclose on your application that you had these 14 speeding tickets or this fine or this -- this legal 15 action in your life, and we as a law faculty had to 16 debate and consider whether we would have admitted 17 that student had we known this information, and so 18 that is a -- very much a disciplinary proceeding, 19 although not an academic disciplinary proceeding. 20 Q. Have you written any law review articles on the 21 subject of procedural due process? 22 A. I -- not specifically on that subject, but I've 23 certainly written about it. 24 Q. Have you written any law review articles on the 25 subject of procedural due process in the higher</p> |
| <p style="text-align: right;">Page 71</p> <p>1 A. I do not believe I was on those committees. But, 2 again, I was the faculty advisor to the law review 3 committee while these things came up quite frequently. 4 Q. So is it fair to say that you have never been a member 5 of a committee in charge of resolving allegations of 6 academic misconduct? 7 A. I've never been a voting member. I would say at 8 Hamline I was an ex officio member, a conscripted 9 member for that one. 10 Q. For just that one incident; correct? 11 A. That one incident of plagiarism, yes. 12 I must add one thing, though. No. Because 13 this is relevant. 14 Q. Well, here's how this works, Dr. Finkelman. If you -- 15 A. Okay. I won't add it. I won't add it. Never mind. 16 Q. If you think that there is an important piece of 17 information that has been left off, Mr. Flores will 18 have an opportunity to ask you questions and then you 19 can add that information you want at the end. Now is 20 my opportunity to ask you questions and for you to 21 provide what you believe is a responsive answer. 22 A. Mr. Porter, I was trying to give you a responsive 23 answer. I remembered one thing that I did not tell 24 you. 25 Q. And what is that?</p> | <p style="text-align: right;">Page 73</p> <p>1 education setting? 2 A. No, I have not. 3 Q. Have you written any other types of scholarly articles 4 on the procedural due process -- on the subject of 5 procedural due process? 6 A. I've written about the incorporation of due process in 7 the Fourteenth Amendment. I've written about due 8 process in the Fifth Amendment. I've written about 9 the debates over the Bill of Rights and the 10 ratification of the Constitution which functioned to a 11 great -- focused to a great extent on the lack of due 12 process protections in the Bill of Rights. I have 13 written a fairly large book called "Landmark Cases of 14 the Supreme Court" which is entirely written by me and 15 a coauthor, and in that book I had to write about 16 many, many due process cases before the Supreme Court 17 summarizing them, and of course I am the coauthor of 18 a -- of a two-volume history of the Constitution 19 called "A March of Liberty" in which we have 20 significant chapters that deal with issues of due 21 process in American constitutional history. There are 22 probably other things I've written that aren't coming 23 to mind at the moment. 24 Q. Okay. I'm asking a slightly different question. 25 Would you like me to repeat it?</p> |

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| <p style="text-align: right;">Page 74</p> <p>1 A. Feel free, because I thought I was answering your 2 question you asked. 3 Q. Have you written any other types of scholarly articles 4 on the subject of procedural due process? 5 A. If you're looking -- if you're asking about 6 specifically an article, I have not written an article 7 only on procedural due process. I have written about 8 procedural due process in many articles. 9 Q. Can you explain to me -- strike that. 10 Are the journals and reviews that you 11 submit your law review and other scholarly articles to 12 peer-reviewed? 13 A. I don't know if you were on law review when you went 14 to law school, but if you were, you would know that 15 law review articles are reviewed usually, although not 16 always, by the law review editors. My other journals 17 and books are peer-reviewed in other scholarly 18 journals and scholarly books and peer-reviewed. 19 Q. What does peer review mean to you? 20 A. Peer review means that an article is sent to a 21 scholar, an expert in the field, an article or book 22 chapter or book manuscript is sent to a scholar in the 23 field who reads it and comments on it and says does 24 this look like good scholarship, yes or no. 25 Q. And does that person who the manuscript is sent to</p> | <p style="text-align: right;">Page 76</p> <p>1 aspects of that. 2 Q. Can you name for me two or three other experts in that 3 field of study? 4 A. None come to mind at the moment. 5 Q. What about John Nowak and Ronald Rotunda, the authors 6 of the Treatise -- 7 A. I know who they are. Yes. 8 Q. Would you consider them -- 9 A. Due process constitutional law experts. 10 Q. Would you consider them to be constitutional law 11 experts? 12 A. Yes, I would. Absolutely. I mean, I -- go ahead. 13 I'm sorry. 14 Q. Do you understand the difference between procedural 15 due process and substantive due process? 16 A. Yes. 17 Q. What is it? 18 A. One deals with whether the procedures are fair, such 19 as a fair trial, and substantive due process comes out 20 of the mid 19th century, the most famous example would 21 be Dred Scott v. Sandford, in which the courts have 22 said that even if a law is passed, that law could deny 23 somebody their due process substantively, that is, in 24 the essence and the reality of what they're getting, 25 without -- even though the procedure itself on the</p> |
| <p style="text-align: right;">Page 75</p> <p>1 have a say over whether or not the work gets 2 published? 3 A. No. By the way, some of the law review journals like 4 Supreme Court Review are, in fact, faculty edited, so 5 they are peer-reviewed by other faculty members. Same 6 for the Yale Journal of Law and Humanities. 7 Q. So your definition of peer review is simply that 8 somebody else in the field reads it and provides 9 comments but does not have any say over whether or not 10 the work actually gets published? 11 A. No. You have input. You don't have say. 12 Q. Are you an expert in procedural due process? 13 A. I am an expert in the history of the Fourteenth 14 Amendment and the Fifth Amendment and -- 15 Q. Are you an expert -- are you an expert -- excuse me. 16 Excuse me, Dr. Finkelman. Are you an expert in 17 procedural due process? Yes or no? 18 A. To the extent that due process is included in the 19 history of the Fifth and Fourteenth Amendment, to that 20 extent I am an expert of due process. And 21 furthermore -- and furthermore, to the extent that due 22 process is part of the general constitutional history 23 of the United States and the Supreme Court decisions, 24 then I am an expert on the constitutional history of 25 the United States and so I would be an expert on</p> | <p style="text-align: right;">Page 77</p> <p>1 face of it seems to be fair. The classic substantive 2 cases would be, at least in historical terms, Dred 3 Scott and Lochner, but there are many others. 4 Q. Would you agree with the following proposition? That 5 there are three components to the protection provided 6 by the Fourteenth Amendment. The first is procedural 7 protections, such as notice and hearing. That's 8 procedural due process. The recognition of 9 unenumerated rights, such as the ones that you just 10 referenced, and right to privacy, things like that. 11 That would be substantive due process. And the third 12 component, recognition of individual rights listed in 13 the Bill of Rights against the state. That would be 14 the doctrine of incorporation. 15 A. Could you repeat the first part of that? And are you 16 able to tell me what you are quoting or is this 17 something you wrote? 18 Q. I'm just asking if you agree with the following 19 proposition, and I'll repeat it more slowly. There 20 are three components to the protections provided by 21 the Fourteenth Amendment. Procedural protections, 22 such as notice and an opportunity to be heard. 23 A. Okay. I can now answer the question because I needed 24 to hear the first part. I would say that that is a 25 very incomplete statement about the Fourteenth</p> |

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| <p style="text-align: right;">Page 78</p> <p>1 Amendment. So, no, I would not agree with that as a 2 statement of the protections in the Fourteenth 3 Amendment. 4 Q. Is there a fourth or fifth or sixth component to the 5 protections provided by the Fourteenth Amendment that 6 are not listed there? 7 A. May I refer to the Constitution of the United States? 8 Because I think -- I think that's -- that's what 9 you're asking me and -- 10 Q. Actually I understand what -- we're going to go back. 11 No. Stop right there. I'm going to ask the question 12 again. I'm going to ask the question again slightly 13 differently because I can tell that it was an 14 improperly phrased question. Thank you for bringing 15 that to my attention. 16 Would you agree with the following 17 proposition? There are three components to the 18 protections provided by the due process clause of the 19 Fourteenth Amendment. The first, procedural 20 protections, such as notice and opportunity to be 21 heard. That's procedural due process. Second, the 22 recognition of unenumerated rights. That's 23 substantive due process. And, third, the recognition 24 of individual rights listed in the Bill of Rights 25 against the states. That's the doctrine of</p> | <p style="text-align: right;">Page 80</p> <p>1 A. I think we're talking about both. Because -- because 2 the -- the -- the Sixth Amendment guarantees you a 3 jury trial. Incorporation says that you have a Sixth 4 Amendment right to a jury trial. The general due 5 process would also say you have a right to a jury 6 trial. 7 Q. Right. 8 A. That's -- they blur. 9 Q. So are you referring, then, to -- are you referring to 10 the doctrine of incorporation? These cases that talk 11 about the importance -- the fundamental nature of this 12 what we call a procedural right to a trial by jury, 13 you're referring to case law that's applying the 14 doctrine of incorporation; correct? 15 A. I'm -- I'm doing both. This is not -- this is not 16 simple yes or no questions. 17 Q. Would you agree with me, though, that procedural due 18 process at its core is an analytically distinct issue 19 from the doctrine of incorporation and substantive due 20 process? 21 A. I'm not sure I agree with that, because I think you 22 can't -- you can't talk about the procedural due 23 process without talking about the Bill of Rights, and 24 that gets you to incorporation. 25 Q. Right. Yeah. So in what -- okay. So when you refer</p> |
| <p style="text-align: right;">Page 79</p> <p>1 incorporation. Do you agree with that? 2 A. I agree with that, although, again, with something 3 that complicated, it's a yes, but I would want to 4 think about it for a long time to see whether there's 5 something else that should be added. 6 Q. So would you agree with me that these components are 7 analytically distinct, although they may blur together 8 at the margins? 9 A. They blur together at more than the margins. For 10 example, procedural due process in the Fourteenth 11 Amendment would also include the procedural due 12 process of the Fifth Amendment which is incorporated 13 through the Fourteenth Amendment. So it's -- and, 14 again, the area between substantive and procedural due 15 process has always been constitutionally blurred. 16 Q. So, for example, the right to a jury, that is in a 17 very real sense an important procedural right; 18 correct? 19 A. Yes. 20 Q. But when we're talking about incorporating the Sixth 21 Amendment against the states through the Fourteenth 22 Amendment, we're not talking about procedural due 23 process, we're talking about the doctrine of 24 incorporation and the substance of the due process 25 clause? Would you agree with that?</p> | <p style="text-align: right;">Page 81</p> <p>1 to procedural due process, are you referring to the 2 incorporation of the Bill of Rights against the 3 states? 4 A. In part. 5 Q. And what have I left out? 6 A. I am also incorporating the procedural due process 7 that -- that you keep coming back to as being I 8 suppose independently in the Fourteenth Amendment. 9 Q. So you recognize that those could be two -- at least 10 two separate core concepts, although they may overlap 11 in certain respects? 12 A. Yes. And courts have done that as well. 13 Q. So can we agree at least for the remainder of this 14 afternoon that when we refer to procedural due process 15 we're talking about the core procedural protection of 16 the Fourteenth Amendment's due process clause to 17 notice and an opportunity to be heard? 18 A. No. 19 (Marked EXHIBIT C for identification) 20 BY MR. PORTER: 21 Q. I've placed in the chat Exhibit, we'll call it C I 22 think at this point. 23 A. If I can't open this, can you email it to me again? 24 Because I'm getting the same weird stuff trying to 25 open it.</p> |

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| <p style="text-align: right;">Page 82</p> <p>1 Q. I'll email it to you right now.</p> <p>2 A. Okay. I just got an email from you which I'm opening.</p> <p>3 Q. So what Dr. Finkelman is reviewing at the moment, I</p> <p>4 believe, and you can correct me if I'm wrong, is an</p> <p>5 excerpt of Nowak and Rotunda's Constitutional Law</p> <p>6 treatise, Seventh Edition, and it's just excerpted</p> <p>7 pages from that treatise. Is that correct,</p> <p>8 Dr. Finkelman?</p> <p>9 A. Yes.</p> <p>10 Q. All right. Please flip to the last page of the PDF.</p> <p>11 It's Page 593 of the text.</p> <p>12 A. Okay.</p> <p>13 Q. This is written by Mr. Nowak and Mr. Rotunda, who</p> <p>14 you've previously agreed are experts in this field.</p> <p>15 A. Yes.</p> <p>16 Q. Please take a look and read the first two paragraphs</p> <p>17 of this page.</p> <p>18 A. Do you want me to read them out loud?</p> <p>19 Q. You can read them quietly to yourself at this</p> <p>20 moment -- at this time.</p> <p>21 MR. FLORES: David, a point of</p> <p>22 clarification. This is your Exhibit C so far?</p> <p>23 MR. PORTER: Yes.</p> <p>24 A. Okay. I've read this.</p> <p>25 BY MR. PORTER:</p> | <p style="text-align: right;">Page 84</p> <p>1 I would simply say that the -- the procedural due</p> <p>2 process has to refer back to the Bill of Right so that</p> <p>3 they, you know -- for example, the right to confront</p> <p>4 witnesses against you is a -- is a procedural right as</p> <p>5 well, and, you know, maybe somebody would say it's</p> <p>6 also a substantive right. I mean, you know, there's a</p> <p>7 gigantic field of constitutional law that debates</p> <p>8 these issues all the time and --</p> <p>9 Q. Is the same test that's used to determine whether or</p> <p>10 not an individual has been deprived of procedural due</p> <p>11 process the same test that's used to determine whether</p> <p>12 or not a provision of the Bill of Rights should be</p> <p>13 incorporated against the states?</p> <p>14 A. No. The courts have used different tests.</p> <p>15 Q. Okay.</p> <p>16 A. But having --</p> <p>17 Q. Thank you.</p> <p>18 A. Having -- okay.</p> <p>19 Q. We discussed earlier your prior service as an expert</p> <p>20 witness. Do you recall that?</p> <p>21 A. Yes.</p> <p>22 Q. Do you recall how many cases in which you've served as</p> <p>23 an expert witness?</p> <p>24 A. We did discuss that, yes.</p> <p>25 Q. And you cited two cases; is that correct?</p> |
| <p style="text-align: right;">Page 83</p> <p>1 Q. Do you agree that the due process clause has several</p> <p>2 quite distinct meanings?</p> <p>3 A. Yes.</p> <p>4 Q. Do you agree with the statement that "This</p> <p>5 'substantive' due process may protect certain</p> <p>6 fundamental rights or void arbitrary limitations of</p> <p>7 individual freedom of action. Part of the substantive</p> <p>8 impact of the due process clause of the Fourteenth</p> <p>9 Amendment is the 'incorporation' of certain guarantees</p> <p>10 in the Bill of Rights."</p> <p>11 Do you agree with that?</p> <p>12 A. Yes.</p> <p>13 Q. Do you agree that, as they state in the next</p> <p>14 paragraph, "The due process clauses also have a</p> <p>15 procedural aspect in that they guarantee that each</p> <p>16 person shall be accorded a certain 'process' . . .?"</p> <p>17 A. Yes.</p> <p>18 Q. So can we agree that there are three analytically</p> <p>19 quite distinct components of the Fourteenth Amendment</p> <p>20 due process clause as stated here by the experts in</p> <p>21 constitutional law, Mr. Nowak and Mr. Rotunda?</p> <p>22 A. Well, I wouldn't -- I wouldn't parse them that way. I</p> <p>23 think that -- that in some ways, while they are</p> <p>24 parsing them that way, they -- they clearly lose track</p> <p>25 of the ways in which they deeply interact, and, again,</p> | <p style="text-align: right;">Page 85</p> <p>1 A. I cited two cases in which I spoke, yes.</p> <p>2 Q. That's Glassroth versus Moore and Popov versus</p> <p>3 Hayashi; is that correct?</p> <p>4 A. That's right.</p> <p>5 Q. Were you challenged as an expert in either one of</p> <p>6 those cases?</p> <p>7 A. No.</p> <p>8 Q. Did the case go to trial?</p> <p>9 A. Both of those cases went to trial.</p> <p>10 Q. How did your report in Glassroth differ from any of</p> <p>11 the other work that you've done as an Amicus on that</p> <p>12 subject?</p> <p>13 A. I don't think that it does.</p> <p>14 Q. How did your report in Popov differ from your previous</p> <p>15 work on the subject that was at issue in Popov?</p> <p>16 A. Again, I don't think it does.</p> <p>17 Q. Have you been offered as an expert in any other case?</p> <p>18 A. Yes.</p> <p>19 Q. Okay. How about Greenville County Republican Party</p> <p>20 Executive Committee versus the State of South</p> <p>21 Carolina?</p> <p>22 A. Yes.</p> <p>23 Q. Does that name ring a bell? Is that the case that you</p> <p>24 referenced earlier involving voting rights?</p> <p>25 A. Yes.</p> |

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| <p style="text-align: right;">Page 86</p> <p>1 Q. Okay. Were you challenged as an expert in that case?</p> <p>2 A. No. Because I was never deposed, and I don't believe</p> <p>3 I was challenged because I believe it was settled on</p> <p>4 summary -- decided on summary judgment before I could</p> <p>5 be deposed. If I was challenged, I don't know I was</p> <p>6 challenged.</p> <p>7 Q. Were you offered as an expert in the case Fields</p> <p>8 versus Speaker of the House, State of Pennsylvania?</p> <p>9 A. I was.</p> <p>10 Q. Were you challenged as an expert in that case?</p> <p>11 A. That case was decided on summary judgment, and the</p> <p>12 chief judge of the district court who wrote the</p> <p>13 opinion cited and quoted me a number of -- quoted my</p> <p>14 expert report a number of times.</p> <p>15 Q. I'm going to ask the question one more time. The</p> <p>16 question was, were you challenged as an expert in that</p> <p>17 case?</p> <p>18 A. As far as I know, no.</p> <p>19 Q. How did your report in that case differ from any of</p> <p>20 the other work that you had done on the topic on which</p> <p>21 you were giving your expert opinion?</p> <p>22 A. I don't believe it did.</p> <p>23 Q. Were you offered as an expert in the case</p> <p>24 Mogervich (ph) versus Allegheny County?</p> <p>25 A. Yes.</p> | <p style="text-align: right;">Page 88</p> <p>1 dicta or not.</p> <p>2 Q. Can you please repeat that?</p> <p>3 A. Pardon?</p> <p>4 Q. Can you please repeat your answer?</p> <p>5 A. I said the -- after the judge excluded me and the</p> <p>6 other expert on the grounds of timeliness, he said</p> <p>7 that our -- our -- our -- that our expert report had</p> <p>8 nothing to add to the case. He referred to both of us</p> <p>9 in this way.</p> <p>10 Q. You agree with me that that information is not listed</p> <p>11 here in the answer to our question to -- directed to</p> <p>12 you about whether or not you had ever been excluded as</p> <p>13 an expert witness?</p> <p>14 A. That information is not there. I gave that</p> <p>15 information to Ms. Vincent, and you can take that up</p> <p>16 with her if she didn't include this, because, as I</p> <p>17 say, I never saw the document that you showed me. I</p> <p>18 only sent her a -- I sent her information and I had</p> <p>19 that quotation from the -- from the judge's opinion as</p> <p>20 well. However, I -- as I said, I think that was</p> <p>21 dicta.</p> <p>22 Q. Does that complete your answer?</p> <p>23 A. Um-hmm.</p> <p>24 (Marked EXHIBIT D for identification)</p> <p>25 BY MR. PORTER:</p> |
| <p style="text-align: right;">Page 87</p> <p>1 Q. Were you challenged as an expert in that case?</p> <p>2 A. Not as far as I know.</p> <p>3 Q. Did your report in that case differ from any of the</p> <p>4 other work you had previously done on the subject on</p> <p>5 which you were offering your expert opinion?</p> <p>6 A. No.</p> <p>7 Q. Are there any other cases in which you have been</p> <p>8 offered as an expert witness?</p> <p>9 A. I was offered as an expert witness in a case which I</p> <p>10 listed in the very first document you gave involving</p> <p>11 a -- something in Haskell County, Oklahoma.</p> <p>12 Q. Is that the Green and ACLU of Oklahoma versus Board of</p> <p>13 County Commissioners of the County of Haskell?</p> <p>14 A. Yes.</p> <p>15 Q. We've previously gone over this answer here that you</p> <p>16 agreed was complete and accurate. You wrote, "On a</p> <p>17 motion of the Defendants, the Court excluded both</p> <p>18 experts because the experts were disclosed well past</p> <p>19 the deadline to testify and would significantly</p> <p>20 prejudice the Defendants." Is that true?</p> <p>21 A. Yes.</p> <p>22 Q. Is there any other reason why you were excluded as an</p> <p>23 expert?</p> <p>24 A. The judge said that my testimony was unnecessary or</p> <p>25 perhaps irrelevant, and I am not sure whether that's</p> | <p style="text-align: right;">Page 89</p> <p>1 Q. I am providing you what we will call Exhibit D to this</p> <p>2 deposition. I've put it in the chat.</p> <p>3 A. And I assume you'll email it to me since I'm having</p> <p>4 trouble getting these otherwise?</p> <p>5 Q. Yes. From now on as a matter of protocol I will email</p> <p>6 you all the exhibits. Please let me know when you've</p> <p>7 had an opportunity to review that document.</p> <p>8 A. I'm waiting -- I'm waiting for it to show up. Here it</p> <p>9 is.</p> <p>10 Yeah. Okay. So I've reviewed it.</p> <p>11 Q. Do you agree with me that the Court denied -- or</p> <p>12 excuse me, granted the motion to exclude your expert</p> <p>13 report and expert opinion because "The Court finds</p> <p>14 that the testimony proffered by Plaintiffs' experts</p> <p>15 would not be helpful and is not properly the subject</p> <p>16 of expert testimony"?</p> <p>17 A. No. I would not agree with you. I would say that the</p> <p>18 Court excluded it because of the failure to timely</p> <p>19 disclose, and that is the -- in citing the Federal</p> <p>20 Rules of Civil Procedure, and once he concluded that,</p> <p>21 I think whatever else he's saying is -- may or may not</p> <p>22 be his reasoning, but, again, I'm not an attorney and</p> <p>23 I'm not an expert on civil procedure, but I would</p> <p>24 imagine if he excluded it entirely on that, that he</p> <p>25 would have -- that the other side, the people who</p> |

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| <p style="text-align: right;">Page 90</p> <p>1 hired me as an expert, would have been entitled to</p> <p>2 have some kind of argument, which it's not clear that</p> <p>3 they did. But, in any event, you know, he chose two</p> <p>4 reasons to exclude it and, you know -- and then when</p> <p>5 he was reversed by the Court of Appeals and ordered</p> <p>6 to --</p> <p>7 Q. All right. Dr. Finkelman, Dr. Finkelman, I am going</p> <p>8 to again instruct you to just answer the question that</p> <p>9 I'm asking.</p> <p>10 A. Okay. I've answered it. I --</p> <p>11 Q. All right. If you're done answering, then you can</p> <p>12 stop and wait for the next question. Do you</p> <p>13 understand?</p> <p>14 A. Yeah.</p> <p>15 Q. Do you agree with me that in the following sentence</p> <p>16 the Court then states "While these experts' reports</p> <p>17 include some scholarship, neither," including your</p> <p>18 report, "represents an objective balance of views, but</p> <p>19 rather the zealous views of an advocate"?</p> <p>20 A. I agree that the order says that.</p> <p>21 Q. Okay. And the order is referring to your expert</p> <p>22 report; correct?</p> <p>23 A. Mine and someone else's.</p> <p>24 Q. Is referring to also -- but it is also referring to</p> <p>25 your expert report; correct?</p> | <p style="text-align: right;">Page 92</p> <p>1 provided that information to plaintiff's counsel?</p> <p>2 A. Yes.</p> <p>3 Q. And you agree with me that that information is not</p> <p>4 contained here in response to Interrogatory 1(c)?</p> <p>5 A. Yes.</p> <p>6 MR. PORTER: Okay. We're going to take a</p> <p>7 quick five-minute break. I need to use the restroom.</p> <p>8 So if we can go off the record.</p> <p>9 (Recess taken at 1:08 p.m.)</p> <p>10 (Back on the record at 1:14 p.m.)</p> <p>11 MR. PORTER: Back on the record.</p> <p>12 BY MR. PORTER:</p> <p>13 Q. Dr. Finkelman, do you have the report that you've</p> <p>14 prepared in this case in front of you?</p> <p>15 A. I do.</p> <p>16 Q. We will put it in the chat and we will mark this as</p> <p>17 Exhibit E.</p> <p>18 A. You do not need to send this to me. I have it.</p> <p>19 (Marked EXHIBIT E for identification)</p> <p>20 BY MR. PORTER:</p> <p>21 Q. Are all the expert opinions that you formed in this</p> <p>22 case contained in this report?</p> <p>23 A. Yes.</p> <p>24 Q. Are all the reasons for your opinions contained in</p> <p>25 this report?</p> |
| <p style="text-align: right;">Page 91</p> <p>1 A. I just said mine and someone else's. That would be</p> <p>2 both of us. Yes.</p> <p>3 Q. And as you have admitted, you are not an attorney;</p> <p>4 correct?</p> <p>5 A. I am not an attorney.</p> <p>6 Q. So you do not have the expertise to determine whether</p> <p>7 or not this portion of the order is, quote unquote,</p> <p>8 dicta; correct?</p> <p>9 A. That's not necessarily the case. As a historian, I --</p> <p>10 and a constitutional law professor, I certainly have</p> <p>11 the expertise to opine and to make an argument on why</p> <p>12 something would be dicta if it is -- if it is part of</p> <p>13 an opinion.</p> <p>14 Q. You agree with me nonetheless that a federal district</p> <p>15 court judge having reviewed your expert report stated</p> <p>16 that it does not represent an objective balance of</p> <p>17 views but instead a zealous view of an advocate?</p> <p>18 A. I agree that that is what the federal district judge</p> <p>19 said, yes.</p> <p>20 Q. You agree also that the federal district court judge,</p> <p>21 describing your expert report, found that it would not</p> <p>22 be helpful and is not properly the subject of expert</p> <p>23 testimony?</p> <p>24 A. I agree that that is what he said.</p> <p>25 Q. And it's your testimony here today that you've</p> | <p style="text-align: right;">Page 93</p> <p>1 A. Yes.</p> <p>2 Q. And is this the testimony that you intend to give if</p> <p>3 you're qualified as an expert?</p> <p>4 A. Yes. I should -- however, I should add to that yes,</p> <p>5 that I may find new things learned, new things -- I</p> <p>6 think I mentioned, for example, Doe v. Baum, which I</p> <p>7 did not know about when I wrote the report, so that if</p> <p>8 I'm called as an expert, I might say something about</p> <p>9 the substance of that case and the arguments of the</p> <p>10 Sixth Circuit, so . . . You know, I have absolutely</p> <p>11 no idea when I might testify. I don't stop reading</p> <p>12 and learning.</p> <p>13 Q. So you agree with me that there is no reference in</p> <p>14 your expert report to Doe versus Baum or Title IX;</p> <p>15 correct?</p> <p>16 A. I did not -- yes. That's correct.</p> <p>17 Q. Did you review the plaintiff's Amended Complaint</p> <p>18 before preparing your expert report in this case?</p> <p>19 A. I read the plaintiff's Amended Complaint. I did not</p> <p>20 go back to it when I was writing my report.</p> <p>21 Q. And you know, then, that the plaintiff has alleged a</p> <p>22 violation of Title IX; correct?</p> <p>23 A. Yes.</p> <p>24 Q. You understand that he has also alleged a violation of</p> <p>25 the Equal Protection Clause; correct?</p> |

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| <p style="text-align: right;">Page 94</p> <p>1 A. Yes. And I have stated that in my -- I have made some 2 references to equal protection in this report. 3 Q. You know that he has also alleged a violation of a 4 state constitutional provision; is that correct? 5 A. I actually had forgotten that. 6 Q. Did you form an opinion on the -- well, strike that. 7 Are all the documents that you've 8 considered in forming your expert opinion in this case 9 referenced in your report? 10 A. I believe so. Although I should say I don't believe I 11 referenced the Amended Complaint, but that obviously 12 influenced me, so if I'm called to testify, I will 13 reread the Amended Complaint if someone wants to ask 14 me about it. 15 Q. What is your method of approach in forming opinions in 16 these types of cases? 17 A. Well, in this case, as I said, I read all of the 18 depositions because my main -- the request of counsel 19 was to talk about due process and the Fourteenth 20 Amendment, and so I read all of the depositions within 21 the context of due process and the history of -- and 22 my understanding of the history of due process and 23 development of due process, and I use due process in a 24 very broad range to include essentially the Fifth 25 through the Eighth Amendments and possibly even the</p> | <p style="text-align: right;">Page 96</p> <p>1 express support for slavery, it's important to review 2 all of his personal correspondence before making an 3 assertion of fact like that; correct? 4 A. I think so. 5 Q. So -- 6 A. And more than correspondence. His public speeches. 7 Q. Right. I'm just using that as an example. I don't 8 mean to be -- 9 A. His financial records. Yes. 10 Q. Things like that. And so did you apply the same 11 approach in this case? 12 A. To the extent that I basically had two weeks to write 13 this and do the research and then rewrite it and think 14 about it, and then I was not in the state of Michigan 15 and I was relying on material that I could only access 16 that was sent to me or I could access on the internet. 17 Q. Did you have any difficulty accessing the documents 18 that were provided to you by plaintiff's counsel? 19 A. No. Not at all. 20 Q. What additional information or materials would you 21 have accessed were you in the state of Michigan? 22 A. Well, if I were writing say a history of this case 23 rather than -- you know, and I was taking five years 24 as I did for my book, which has only two chapters on 25 John Marshall, I might have gone to the Wayne State</p> |
| <p style="text-align: right;">Page 95</p> <p>1 Fourth Amendment because a search could violate due 2 process as well. So I read all these and then I 3 proceeded to think about where the process as it was 4 told to me in a sense by the people who were being 5 deposed from the university, from the medical school, 6 I read what they said about the due process -- their 7 process. I read their rules and then I proceeded to 8 write my report. 9 Q. What kind of sources or authorities do you typically 10 rely on in forming an opinion like the one you reached 11 in this case? 12 A. Could you -- could you be more specific? 13 Q. For example, is it important to consult the document 14 or a set of documents establishing the applicable 15 process when it comes to questions of due process in 16 the context of higher learning? 17 A. Yes. 18 Q. Is it important as a historian to review all source 19 materials before making assertions of fact regarding 20 those materials? 21 A. As much source material as there is time to review and 22 you have available. 23 Q. So just to use an example that you might know, before 24 making assertion that as a matter of historical fact 25 Chief Justice John Marshall did not in his writings</p> | <p style="text-align: right;">Page 97</p> <p>1 Police Department, for example, and seen if I could 2 look at the Complaint and the -- and see if I had 3 access -- could have access to their investigation 4 where they chose not to actually do anything about 5 this. I might want to interview myself as an 6 historian all the people involved. I mean, there are 7 lots of things I would do if I were writing a book. 8 You know, this is a -- 9 Q. Okay. Dr. Finkelman, do you know whether or not that 10 information was requested by plaintiff in this case? 11 A. I do not. 12 Q. So -- 13 A. Actually I take that back. To the best of my 14 knowledge, I do not believe that the -- that Wayne 15 State University -- from all of the information I have 16 seen, Wayne State University did not request police 17 reports. So I do not know for a fact. I only know 18 from what I've read. 19 Q. Dr. Finkelman, I'm asking you a different question. 20 A. Okay. 21 Q. You just said a moment ago that you would go to the 22 police department to look for records regarding any 23 report that Ms. Roe had made regarding Mr. Eid. Is 24 that right? 25 A. I would.</p> |

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| <p style="text-align: right;">Page 98</p> <p>1 Q. Do you know whether or not the plaintiff in this case 2 requested those very documents? 3 A. I do not know if the plaintiff requested them. 4 Q. What databases did you use in your research in 5 formulating your expert opinion in this case? 6 A. Mostly I used HeinOnline to look at cases. 7 Q. Any others? 8 A. I do not believe so. 9 Q. Did you consult any contemporary legal precedent? 10 A. Any contemporary what? 11 Q. Legal precedent. 12 A. Well, I mean, I cited, for example, <i>Timbs v. Indiana</i>, 13 which is 2019. That's pretty contemporary. I 14 cited -- if contemporary is in my lifetime, then 15 <i>Goldberg versus Kelly</i> or <i>Gideon versus Wainwright</i>. 16 Q. I suppose it's in the eye of the beholder as far as 17 contemporary goes. 18 A. Yes. 19 Q. In reviewing documents and arriving at your expert 20 opinion in this case, did you consider alternative 21 explanations than the ones that you've provided in 22 your report? 23 A. Yeah. Yes. I looked -- I looked at the evidence and 24 evaluated it. Of course there have to be alternative 25 explanations to be at least considered when you look</p> | <p style="text-align: right;">Page 100</p> <p>1 A. Pardon? 2 Q. Would you make credibility determinations in ruling 3 out alternative explanations? 4 A. Well, I did to some extent, but the -- you know, my -- 5 I think the credibility that was offered is based in 6 the depositions. That is, if someone is inconsistent 7 in a deposition, if someone says something and -- and 8 then later says something else, I might -- I might -- 9 I might say, well, there's -- there is a credibility 10 issue here that -- that needs to be -- that needs to 11 be addressed. 12 And, in fact, you know, you asked me a 13 minute ago, and this is to amend my answer to one of 14 your questions a minute ago if I may, you asked me if 15 this is all I would testify to, and I gave the example 16 that I might mention <i>Roe v. Dowd</i> (ph). The other 17 thing that I might mention which I did not is -- and 18 I'm looking for her name, the school counselor. Is it 19 <i>Chattabaugh</i> (ph)? The medical school's counselor, the 20 nurse. What is her name? 21 Q. Again, I'm not here to answer your questions. Are you 22 trying to -- 23 A. Okay. Fine. Fine. You don't have to answer my 24 question. I just need a minute to go through my 25 deposition to find her name, which you probably know</p> |
| <p style="text-align: right;">Page 99</p> <p>1 at evidence. 2 Q. And how did you go about ruling out those alternative 3 explanations? 4 A. Well, I was limited to the documentary evidence I had, 5 which is the -- which is the depositions and the 6 statements and the conclusions of two university 7 committees. So I basically balanced, you know, what I 8 did -- I, by the way, approached this as a historian. 9 I'm looking at a body of material. I'm trying to 10 understand the history of how this played out. 11 Q. So let me ask it again. How did you go about ruling 12 out alternative explanations for opinions or 13 conclusions that you reached in your report? 14 A. I -- I don't think I can give you an answer to that. 15 I'm not sure what you mean by how I went about it. I 16 read the evidence. I thought about the evidence. I 17 went back sometimes to the evidence. I, for example, 18 went back a number of times to some of the depositions 19 when I would read in another deposition something, and 20 then I would go back to the other deposition to see 21 whether the evidence matched and what the evidence 22 was. I looked at one email and then I might look at 23 another email. Then I might go back to the first 24 email. You know, I'm balancing the information. 25 Q. Did you make credibility determinations?</p> | <p style="text-align: right;">Page 101</p> <p>1 but you don't want to tell me, and that's fine. I 2 will go through my deposition until I can find it. 3 You know, you're talking about taking up too much 4 time, but . . . 5 Q. All right. We're going to move on, Dr. Finkelman. If 6 you can find it -- 7 A. Robichaud. No. What I was going to say is if I were 8 to testify, I might use Ms. Robichaud's deposition, 9 which I did not use in writing this report. 10 Q. Did you have access to her deposition at the time that 11 you drafted your report? 12 A. It came late and the report was virtually finished. 13 In fact, I think it came after I finished the report, 14 so I did not have access to it. Yes. That's correct. 15 Q. Does that finish your answer? 16 A. Um-hmm. 17 Q. Okay. Would you please turn to Paragraph 13 of your 18 report? 19 A. Sure. 20 Q. In this paragraph you discuss the basis for your 21 interpretation, analyses, and conclusions and you 22 state that you base them on your "education, research, 23 writing, and experience as a professional historian 24 and legal scholar and my more than forty years as a 25 professor and college president."</p> |

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| <p style="text-align: right;">Page 102</p> <p>1 A. Yes.</p> <p>2 Q. Do you see that?</p> <p>3 A. I do.</p> <p>4 Q. As far as your education is concerned, you're not a</p> <p>5 lawyer; correct?</p> <p>6 A. That is correct.</p> <p>7 Q. Not a medical doctor; correct?</p> <p>8 A. That is correct.</p> <p>9 Q. As a legal scholar, is that a reference to the</p> <p>10 scholarship that's in your curriculum vitae?</p> <p>11 A. It is. And also the fact that I took the first year</p> <p>12 of Harvard Law School as a postdoctoral fellow of the</p> <p>13 law school and I took approximately six or seven law</p> <p>14 school courses while I did my Ph.D. at the University</p> <p>15 of Chicago and that I have taught at law schools for</p> <p>16 about 20 years and been involved in the legal world in</p> <p>17 many, many ways.</p> <p>18 Q. And you agreed with me earlier that you have never</p> <p>19 taught a procedural due process class; is that</p> <p>20 correct?</p> <p>21 A. That is correct.</p> <p>22 Q. And you have never written a law review article</p> <p>23 devoted to procedural due process; is that correct?</p> <p>24 A. Devoted solely to procedural due process, no.</p> <p>25 Q. You've never had a voting membership on any academic</p> | <p style="text-align: right;">Page 104</p> <p>1 A. No, I am not.</p> <p>2 Q. You've previously served as a president of an</p> <p>3 institution of higher learning; is that correct?</p> <p>4 A. For just under four years, yes.</p> <p>5 Q. And in that role did you ever adjudicate a student</p> <p>6 code of conduct case?</p> <p>7 A. No. But as president I wouldn't have adjudicated. It</p> <p>8 would come to me after it was adjudicated.</p> <p>9 Q. The paragraph above in Paragraph 12 you state that "I</p> <p>10 will consider the university's own procedures against</p> <p>11 the requirements of the law that I am familiar with as</p> <p>12 a constitutional scholar, professor, and college</p> <p>13 president." Do you see that?</p> <p>14 A. This is in Paragraph 12? Which paragraph are you in?</p> <p>15 Q. Paragraph 12, yes. About midway through.</p> <p>16 A. Yes. I see that.</p> <p>17 Q. I just want to make sure I understand this. So you</p> <p>18 intend to take the facts, the Wayne State's procedures</p> <p>19 as applied to Mr. Eid in this case and apply them to</p> <p>20 the law as you understand it as a constitutional</p> <p>21 scholar?</p> <p>22 A. And through history of due process, yes.</p> <p>23 Q. What university procedures are you referring to there?</p> <p>24 A. Everything from the first -- well, starting with the</p> <p>25 student code of conduct or the student code. I'm not</p> |
| <p style="text-align: right;">Page 103</p> <p>1 misconduct or promotions type committee at an</p> <p>2 institution of higher learning; is that correct?</p> <p>3 A. Well, it depends what you mean by promotions because I</p> <p>4 certainly was a voting member to determine whether or</p> <p>5 not people got degrees.</p> <p>6 Q. And is that in reference to the criminal background</p> <p>7 committee that you referenced earlier?</p> <p>8 A. It's -- it's the whole thing. You know, anything can</p> <p>9 come up when you're -- when you're voting on the</p> <p>10 degree and various cases come up, yes.</p> <p>11 Q. Okay. Was that a reference to your stint at I believe</p> <p>12 it was Tulsa Law School which all faculty members had</p> <p>13 a voting interest in determining whether --</p> <p>14 A. And also Albany Law School. Same thing. The faculty</p> <p>15 has to vote on degrees.</p> <p>16 Q. You've never taught at a medical school; correct?</p> <p>17 A. Correct.</p> <p>18 Q. So you're not familiar with the Association of</p> <p>19 American Medical Colleges?</p> <p>20 A. Not in any meaningful way. I know it exists.</p> <p>21 Q. Are you familiar with its accreditation committee, the</p> <p>22 liaison committee on medical education?</p> <p>23 A. I am not.</p> <p>24 Q. Are you familiar with the LCME as its acronym of its</p> <p>25 standards for student achievement?</p> | <p style="text-align: right;">Page 105</p> <p>1 sure -- I don't remember --</p> <p>2 Q. I'm asking you what document are you referring to?</p> <p>3 Not -- I don't want to know what literally happened to</p> <p>4 Mr. Eid in this case. But what procedures are you</p> <p>5 referring to --</p> <p>6 A. Start with the student code.</p> <p>7 Q. Okay. Anything else?</p> <p>8 A. Which sets out the procedures.</p> <p>9 Q. Anything else?</p> <p>10 A. I looked at procedures as explained in the</p> <p>11 depositions.</p> <p>12 Q. And what were those? Strike that. I'll withdraw the</p> <p>13 question.</p> <p>14 Are you referring to how the procedures</p> <p>15 played out in Mr. Eid's case?</p> <p>16 A. Yes.</p> <p>17 Q. Are all the opinions that you express here in this</p> <p>18 report expressed to a reasonable degree of certainty?</p> <p>19 A. A reasonable degree of certainty, yes.</p> <p>20 Q. What do you mean by reasonable degree of certainty?</p> <p>21 A. That I have read all of these depositions. I have</p> <p>22 read the exhibits. I have read much -- I have read</p> <p>23 the email correspondence. I have thought about due</p> <p>24 process and the rights of people and taught about it</p> <p>25 in con law and other places my whole life -- for much</p> |

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| <p style="text-align: right;">Page 114</p> <p>1 example. Let's see. The right to counsel. 2 A. Yeah. 3 Q. Is it your understanding that the Sixth Amendment 4 right to counsel applies only in the criminal setting? 5 A. I am not a hundred percent sure that would be the case 6 today. Again, and here's my thinking. Okay? If the 7 excessive fines clause applies in a civil setting, 8 then I would imagine that the right to counsel in a -- 9 say a state proceeding against an individual in a 10 civil matter would also be the case. I can't imagine, 11 for example, that if the State of Michigan told 12 someone, well, you don't have a right to counsel in a 13 tax -- Michigan State tax court that that would get 14 very far. So I would think you would have a -- you 15 would clearly have a right to counsel in a civil case 16 and the state could not deny you that right to 17 counsel. 18 Q. Are you aware of any case in which a Federal Court has 19 applied the Sixth Amendment right to counsel to 20 outside the criminal setting in a federal case? 21 A. I would have to go back and read Goldberg versus Kelly 22 because certainly the right to the due process hearing 23 certainly implied the right to counsel. One would not 24 imagine in that case that welfare recipients would 25 have been expected to appear pro se.</p> | <p style="text-align: right;">Page 116</p> <p>1 counsel. 2 A. Yes. 3 Q. That you've privately retained. 4 A. There -- there are two separate rights. They've 5 merged in the criminal context. They probably haven't 6 fully merged in the civil context yet. 7 Q. And so then let me -- then let me ask the question 8 again. Would it surprise you that Goldberg versus 9 Kelly expressly declined to find the right to the 10 appointment of counsel in the setting -- 11 A. Yes. 12 Q. It would not surprise you or it would? 13 A. It's -- I believe -- as you say, it's what the court 14 did. 15 Q. All right. I want to jump to Paragraph 97 of your 16 report, which is at Page 47. 17 A. Thank you. 18 Q. And you ask what I think is a very interesting and 19 insightful question. You say, ". . . even if he sent 20 the texts to Ms." -- I'm going to call her Ms. Roe, 21 "that upset her, are these really grounds for 22 expulsion?" 23 And you ask the question, but I do not see 24 an answer to it, and I'm just curious. Why didn't you 25 answer that question?</p> |
| <p style="text-align: right;">Page 115</p> <p>1 Q. Would it surprise you that the Supreme Court held just 2 the opposite in Goldberg versus Kelly? 3 A. What do you mean? 4 Q. Would it surprise you that the Supreme Court expressly 5 declined to find a right to counsel in the setting 6 that was at issue in Goldberg versus Kelly? 7 A. You know, if it did, I -- I had forgotten that, and 8 that does surprise me, but I don't think it -- I still 9 think given the recent case on excessive fines -- and 10 when you say denied the right to counsel or denied the 11 right of the state to have to provide counsel? 12 Q. So we'll get to that. What do you think the right to 13 counsel means under the Sixth Amendment? 14 A. Well, it certainly means at a -- at the most basic 15 minimum before say Powell versus Alabama and before 16 Gideon, the right to counsel meant that you cannot be 17 denied the right to provide counsel for yourself in a 18 hearing, and I do not believe that Goldberg versus 19 Kelly holds the state can deny Kelly the right to 20 counsel when -- when appealing what's going on. 21 Whether the state has to provide counsel is a whole 22 different matter. 23 Q. Okay. That's a misunderstanding I had there. Okay. 24 I thought you were referring to the appointment of 25 counsel, not just the ability to have the presence of</p> | <p style="text-align: right;">Page 117</p> <p>1 A. In part because the record of this case is such a 2 sparse factual record. There is no cross-examination 3 of -- of the complainant. There is no 4 cross-examination of the mother, who brought the 5 complaint. There is no development of other evidence. 6 There -- there are all kinds of weird hints of things, 7 but there's no actual development of evidence. 8 There's allegations, for instance, of sexual 9 misconduct in some of the depositions, but since 10 everybody admits that Mr. Eid only met Ms. Burton 11 once, and, by the way, she is referred to this in the 12 depositions so I don't think we need to pretend that 13 we don't know her name. 14 Q. Doctor, we've tried studiously to avoid using her last 15 name just for her own personal privacy. We have 16 made -- 17 A. Then I will -- then I will refer to her as -- should I 18 refer to her as Ms. Doe, Ms. Roe? How would -- 19 Q. We've been using Ms. Roe or Roe. 20 A. All right. So since there's no -- there's no -- since 21 it's very clear that Mr. Eid only met Ms. Roe for 22 approximately ten minutes face to face once in their 23 lives, if there is a -- if there is something in this 24 record or if there's something in this case that leads 25 to the expulsion of Mr. Eid, I don't see it. You</p> |

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| <p style="text-align: right;">Page 126</p> <p>1 why they're plagiarism, I don't think the court 2 reviews the conclusion that they're plagiarism, again, 3 unless under certain circumstances the student says, 4 look, they're not plagiarisms. 5 Q. So let me make sure I understand. You said appeal 6 your right to bring evidence or provide an explanation 7 for your conduct and the right to confront witnesses? 8 A. Right to speak. Right to speak at your own hearing. 9 Right to -- and, by the way, right to counsel. I -- 10 the -- one of the instances I told you about is a 11 student showed up with counsel. 12 Q. Okay. So are you -- I want to make sure I understand. 13 You're saying that the due process clause requires in 14 the academic decision-making setting, so we're not 15 talking about disciplinary, we're just talking about 16 academic, is it your testimony here as an expert that 17 the due process clause requires the availability of an 18 appeal, your -- the right to bring evidence or present 19 your case, the right to confront witnesses, and the 20 right to have the presence of counsel? 21 A. And notice. 22 Q. And notice. 23 A. And probably other things that I haven't thought 24 about, because I didn't spend a lot of time thinking 25 about this because this is not the case before us, and</p> | <p style="text-align: right;">Page 128</p> <p>1 A. Okay. Repeat the question. 2 Q. If this were a case of academic decision-making, not 3 disciplinary, but academic, would your expert opinion 4 that you've issued in this report apply? 5 A. Okay. If this were a case of academic 6 decision-making, my expert report would apply not to 7 the substance of a grade but to the process and the 8 procedure and possibly the evidence if it were -- if 9 the evidence were in question. And, again, if you'll 10 bear with me for one second. If the student takes an 11 exam and writes a categorically wrong answer and the 12 faculty member says this is a wrong answer, you fail 13 the exam, that's different than if there's an 14 allegation of academic dishonesty because that's a 15 question -- that's a factual question that requires 16 some kind of evidentiary hearing, not merely an 17 assertion. 18 Q. So is it your expert opinion that the same procedural 19 safeguards that apply in a disciplinary setting also 20 apply in an academic setting? 21 A. Only in some. I'm making a distinction between 22 allegations of academic dishonesty and, say, grading. 23 Q. Okay. Subject to that caveat, is that a true 24 statement? 25 A. Yes. And, again, since I have not thought this</p> |
| <p style="text-align: right;">Page 127</p> <p>1 I have conceded to you in my report and we have 2 conceded here that in general there is no external 3 review of an academic decision. 4 Q. So I guess -- 5 A. For extraordinary instances, in other words. 6 Q. So I want to make sure I understand this. If this 7 were a case of academic decision-making, not 8 disciplinary but academic, you would -- your expert 9 opinion is this just wouldn't apply? 10 A. Again, unless -- 11 MR. FLORES: Objection to the form. That's 12 not this case. Now you're asking him to speculate on 13 what he might do in a completely different case. 14 MR. PORTER: Okay. So I'm asking him a 15 hypothetical question, which I'm allowed to do during 16 an expert deposition, and I'm asking him about the 17 scope of his expert opinion. 18 BY MR. PORTER: 19 Q. I'll take an answer. 20 A. My expert opinion would be that if the question is has 21 the student -- and let me -- actually let's move it 22 out of the academic honesty question because that -- 23 Q. No, no, no. I want an answer to the question that I 24 have asked you and we are going to repeat it so I can 25 get an answer.</p> | <p style="text-align: right;">Page 129</p> <p>1 through and you're asking me hypothetically, I would 2 reserve the right to spend the next couple weeks 3 thinking about it and seeing if I changed my mind. 4 Q. Well, no. You're the expert, you know. 5 A. I have been asked to be an expert in this particular 6 case and not an expert on the hypothetical that you're 7 giving me, and so I am giving you a hypothetical 8 answer based on what you've given me. 9 Q. So let me just follow up on a distinction that you 10 just made between an erroneous grade and academic 11 dishonesty. What is your definition of academic 12 standards? 13 A. I'm -- I'm not sure I know what you're asking. That's 14 a very -- 15 Q. You state in Paragraph -- you state in Paragraph 100, 16 ". . . except in the most unusual circumstances, 17 [courts] should never question academic standards and 18 the considered opinion of academic 19 professionals . . ." What is? 20 A. Yes. 21 Q. What is your definition of academic standards? 22 A. So the academic standards in that context would be the 23 standard of what constitutes a passing effort on the 24 part of the student on an exam or on a paper or on a 25 thesis or dissertation, and those standards -- those</p> |

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| <p style="text-align: right;">Page 138</p> <p>1 cases. The right to a due process hearing before 2 being denied a -- before having a government benefit 3 taken away from you is -- is -- is now part of the 4 civil law. I think that the right to confront a 5 witness, the right to testify are all accepted in 6 civil matters. Again, if there's a civil proceeding 7 in tax court, you have a right to present your own 8 evidence and testify. 9 Q. What's your authority for the proposition that 10 individuals have a constitutional right to confront 11 witnesses in a civil case? 12 A. I can't give you that right now. 13 Q. Okay. You agreed with me earlier, though, that the 14 test for determining whether or not due process has 15 been -- excuse me, an individual's rights under the 16 procedural due process clause have been violated is 17 different than the test for determining whether or not 18 a particular Bill of Rights should be incorporated 19 against the states. 20 A. Wait. Could you repeat that? I'm not sure I followed 21 it. 22 Q. Did I understand you earlier correctly when you agreed 23 that the test for determining whether or not 24 somebody's procedural due process rights have been 25 violated is different than the test that is used for</p> | <p style="text-align: right;">Page 140</p> <p>1 asking me. 2 Q. Can you state for me here what is the standard or the 3 test for determining whether or not somebody's been 4 deprived of their rights under the procedural due 5 process? 6 A. The standard is to look at the facts of the case and 7 to look at the traditions and precedent so that, for 8 example, in Powell versus Alabama, which is a -- which 9 is in part an incorporation case, the ruling of the 10 Court was that even though the state had authorized 11 lawyers to represent Powell, he had not gotten 12 procedural due process because of the factual 13 situation of the way the lawyers had represented him 14 and therefore he had been denied his Sixth Amendment 15 rights. So, again, the incorporation is tied to the 16 due process. 17 Q. Okay. Is the test for determining whether or not 18 somebody's procedural due process rights have been 19 violated the same in the civil setting as it is in the 20 criminal setting? 21 A. I'm not -- I'm not sure I -- I -- I know that -- I 22 know the answer to that fully. 23 Q. You know, I've got to say that for an expert that's 24 being presented in a case in federal court on a claim 25 involving procedural due process I am shocked at the</p> |
| <p style="text-align: right;">Page 139</p> <p>1 determining whether or not a provision of the Bill of 2 Rights should be incorporated against the states 3 through the Fourteenth Amendment? 4 A. I don't think I said that. What I said was that, 5 generally speaking, while the federal right within the 6 Bill of Rights has been incorporated against the 7 states, there have been some specific I suppose 8 substantive content to a federal right, and, again, 9 what comes up is the anomaly of jury trial, that have 10 not been incorporated against the states. I think by 11 and large everything other than that probably is one 12 test. 13 Q. As an expert in due process, what is the test that's 14 used to determine whether or not somebody's procedural 15 due process rights have been violated in a particular 16 case? 17 A. The test is to look at the facts and to balance them 18 against precedent, against rules that have developed 19 over -- against -- against what Justice Cardozo and 20 Justice Black hold, the notions of ordered liberty. 21 Q. That's the incorporation standard, not the right -- 22 not the standard for procedural due process. I 23 thought we just went over that earlier when we got out 24 the constitutional law treatise. 25 A. I guess I -- I guess I don't understand what you're</p> | <p style="text-align: right;">Page 141</p> <p>1 fundamental lack of knowledge of just the basics of 2 procedural due process that you are exhibiting here. 3 Are you qualified to give an expert opinion on 4 procedural -- 5 MR. FLORES: Objection. Objection. This 6 is clearly an outrageous effort to try to now bait the 7 witness here, David. If you have a question, ask it. 8 And you can make your arguments when you have your 9 motion. 10 BY MR. PORTER: 11 Q. Dr. Finkelman, do you believe that you are qualified 12 to provide an expert opinion on procedural due 13 process? 14 A. Yes. 15 Q. Okay. Then, again, answer the question of whether or 16 not there's a different standard for determining 17 whether or not the state has violated procedural due 18 process in the civil setting versus the criminal 19 setting. 20 A. Whether there is a different standard or whether there 21 should be a different standard? 22 Q. Whether there is. 23 A. And, again, I -- you know, before I come before a 24 court to testify on this, I will do lots of research 25 to answer that question.</p> |

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| <p style="text-align: right;">Page 142</p> <p>1 Q. But you have not done it as you sit here today?</p> <p>2 A. I have not done it as I sit here today because, quite</p> <p>3 frankly, the depositions and the facts in evidence in</p> <p>4 this case so egregiously violate the most minimal</p> <p>5 standards of due process, starting with the failure of</p> <p>6 the university, and in multiple ways to follow its own</p> <p>7 rules and its own procedure, its failure to allow</p> <p>8 Mr. Eid to testify in his own behalf, the failure to</p> <p>9 allow confrontation of witnesses that --</p> <p>10 Q. Dr. Finkelman, we'll get into --</p> <p>11 A. No. Wait a minute. No. No. I'm sorry, Mr. Porter.</p> <p>12 You asked me a question and I have a right to answer</p> <p>13 it.</p> <p>14 Q. Okay. Thank you for your answer. You've answered it.</p> <p>15 A. My answer is not finished, Mr. Porter.</p> <p>16 Q. You'll have ample opportunity to provide that</p> <p>17 information when we discuss the process that was</p> <p>18 afforded to Mr. Eid. Okay? I'm just asking you if</p> <p>19 you had done that research and the answer is no.</p> <p>20 Okay? You state here in your expert report that while</p> <p>21 a case -- this case is a civil matter, the standards</p> <p>22 for due process in the criminal realm are in many ways</p> <p>23 similar. So that was the basis for my question. It's</p> <p>24 in your report. Why the -- if the standards are the</p> <p>25 same or different, and as I understand it, you are not</p> | <p style="text-align: right;">Page 144</p> <p>1 Miranda, those are the Supreme Court's most</p> <p>2 influential or more important cases --</p> <p>3 A. They're among them.</p> <p>4 Q. -- of procedural due process?</p> <p>5 A. To say what is the most important, I mean, come on.</p> <p>6 Q. I'm just making sure that that was -- the record was</p> <p>7 clear that that was your answer.</p> <p>8 Please turn to Paragraph 37 of your report.</p> <p>9 In this paragraph you discuss the lack of information</p> <p>10 that is in the subject line of Ms. Camaj's email to</p> <p>11 Mr. Eid inviting him to a fact-finding conference. Do</p> <p>12 you see that?</p> <p>13 A. Yeah. Um-hmm.</p> <p>14 Q. Do you know whether Mr. Eid failed to open the email</p> <p>15 from Ms. Camaj?</p> <p>16 A. I do not.</p> <p>17 Q. Do you know --</p> <p>18 A. I actually assumed that he did since he showed up.</p> <p>19 Q. Do you know whether or not he failed to timely respond</p> <p>20 to the email that Ms. Camaj sent?</p> <p>21 A. It appears that he responded in a timely manner.</p> <p>22 Q. So this criticism or deficiency that you address here</p> <p>23 in Paragraph 37 doesn't really fit the facts of this</p> <p>24 case?</p> <p>25 A. Wait. On Page 37 or Paragraph 37?</p> |
| <p style="text-align: right;">Page 143</p> <p>1 able to answer that question; is that correct?</p> <p>2 A. Let me give you -- let me give you a somewhat</p> <p>3 different answer. Mr. Eid was not, for example,</p> <p>4 entitled to a jury trial in the internal proceedings</p> <p>5 of Wayne State University. So in that sense, the</p> <p>6 standard for due process in the civil context within</p> <p>7 the university would not be the same as if it were a</p> <p>8 trial in a court. So in that -- to that extent, yes,</p> <p>9 there would be some differences between what would</p> <p>10 constitute due process within the university</p> <p>11 administrative hearings and within a court.</p> <p>12 Q. Can you tell me what is the most important, in your</p> <p>13 opinion, the most important or influential Supreme</p> <p>14 Court opinion on procedural due process?</p> <p>15 A. I -- there -- there are many.</p> <p>16 Q. Name one.</p> <p>17 A. We've talked about a number of them and there are many</p> <p>18 others.</p> <p>19 Q. Name one. Name one.</p> <p>20 A. We've talked, for example, about the procedural due</p> <p>21 process in a number of criminal cases, such as Gideon,</p> <p>22 such as Miranda, which I haven't mentioned yet.</p> <p>23 These -- we've talked about it in -- so there's a few,</p> <p>24 you know.</p> <p>25 Q. Okay. So your answer is criminal cases like Gideon,</p> | <p style="text-align: right;">Page 145</p> <p>1 Q. Excuse me. Paragraph 37.</p> <p>2 A. I'm sorry. Because you had directed me to Page 37, I</p> <p>3 believe, unless I misheard you. Hold on. Hold on one</p> <p>4 second. Yeah. Okay. I'm here now. Yeah.</p> <p>5 Q. In this paragraph you discuss the purported lack of</p> <p>6 information that is in the subject line of Ms. Camaj's</p> <p>7 email to Mr. Eid inviting him to a fact-finding</p> <p>8 conference. Do you see that?</p> <p>9 A. Yes.</p> <p>10 Q. Do you know whether Mr. Eid failed to open the email</p> <p>11 from Ms. Camaj?</p> <p>12 A. I believe he opened it.</p> <p>13 Q. Part of the problem that you note here in Paragraph 37</p> <p>14 through 38 is if it is not flagged, then a student may</p> <p>15 not open it up in a timely manner; is that correct?</p> <p>16 A. Yes. Um-hmm.</p> <p>17 Q. Do you know whether Mr. Eid failed to open this up in</p> <p>18 a timely manner?</p> <p>19 A. I believe he opened it up in a timely manner.</p> <p>20 Q. Okay. So this deficiency that you point out doesn't</p> <p>21 really fit the facts of this case, does it?</p> <p>22 A. It points to the procedural problems of Wayne State's</p> <p>23 process and to the -- to the extent that Wayne State's</p> <p>24 process begins by not giving students appropriate</p> <p>25 information and --</p> |

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| <p style="text-align: right;">Page 154</p> <p>1 as a question.</p> <p>2 Q. Okay. So in the Answers to Interrogatories that you</p> <p>3 just reviewed earlier and declared that were true and</p> <p>4 accurate states that you reviewed all documents</p> <p>5 exchanged by the parties in discovery; is that</p> <p>6 correct?</p> <p>7 A. I -- I reviewed the documents that we mentioned. I</p> <p>8 don't know if I -- I don't know if other documents</p> <p>9 were exchanged. I cannot testify to what documents I</p> <p>10 did not see that may or may not have been exchanged.</p> <p>11 MR. PORTER: I think it might be helpful at</p> <p>12 this point to go off the record. Bob, are you okay</p> <p>13 with that?</p> <p>14 MR. FLORES: Okay.</p> <p>15 (Recess taken at 2:50 p.m.)</p> <p>16 (Back on the record at 3:12 p.m.)</p> <p>17 MR. FLORES: Mr. Porter had requested that</p> <p>18 I talk with my colleague about the plaintiff's</p> <p>19 response to defendants' second interrogatories, which</p> <p>20 is I think Exhibit A for purposes of this deposition.</p> <p>21 I have done that, and I've informed Mr. Porter that</p> <p>22 the plaintiff did provide Dr. Finkelman with access to</p> <p>23 a Dropbox link in which discovery from both sides was</p> <p>24 available as well as the Complaint and exhibits that</p> <p>25 were part of that, but as with any witness, the case</p> | <p style="text-align: right;">Page 156</p> <p>1 that were provided to you; is that correct?</p> <p>2 A. I had opportunity to review them, and I would say that</p> <p>3 I reviewed -- I looked at most of them. I did not</p> <p>4 look at all of them in the same level of detail simply</p> <p>5 because there was not time.</p> <p>6 Q. Did plaintiff's counsel instruct you on what documents</p> <p>7 to review?</p> <p>8 A. Plaintiff's counsel suggested that I read the</p> <p>9 depositions, which is what I read, and the -- and</p> <p>10 the -- all of the documents connected with the</p> <p>11 depositions and also various -- the papers coming out</p> <p>12 of the Promotions Committee and the -- it's been a</p> <p>13 long day. I'm sorry. The Promotions Committee and</p> <p>14 the Professionalism Committee.</p> <p>15 Q. Did plaintiff's counsel tell you there was not a need</p> <p>16 to review the other documents that you just -- other</p> <p>17 than what you've just referenced?</p> <p>18 A. It wasn't a question of need. It was a question of</p> <p>19 time. I mean, you know, if I -- if I had been</p> <p>20 contacted a month earlier than I had, there would have</p> <p>21 been -- I probably would have looked at everything --</p> <p>22 I like to be very thorough in what I look at. I like</p> <p>23 to look at all documentation that's available.</p> <p>24 Q. So is it true -- so are you saying that you did not do</p> <p>25 a thorough review of all the documents in this case?</p> |
| <p style="text-align: right;">Page 155</p> <p>1 file is voluminous and they -- it's my understanding</p> <p>2 that Dr. Finkelman looked at those documents he</p> <p>3 believed were necessary to allow him to provide his</p> <p>4 report. In addition to those, for the record, I did</p> <p>5 provide him with a number of additional copies of</p> <p>6 certain exhibits that were part of the depositions</p> <p>7 that I took of the defendants in this case,</p> <p>8 Drs. Jackson, Baker, Chadwell, and then Nikolina Camaj</p> <p>9 and Loretta Robichaud. So I want -- so that's the --</p> <p>10 that's our position with respect to I think it is</p> <p>11 Subsection g on Page 9 of our plaintiff's response,</p> <p>12 which is, as I noted, Exhibit A.</p> <p>13 MR. PORTER: Okay. Thank you for that</p> <p>14 clarification and for clearing that up.</p> <p>15 BY MR. PORTER:</p> <p>16 Q. Dr. Finkelman, do you agree that you were provided</p> <p>17 with all of the documents that Mr. Flores just</p> <p>18 referenced as being exchanged between the parties in</p> <p>19 this case?</p> <p>20 A. I agree that I was -- yes. The documents that he says</p> <p>21 I got I was provided with.</p> <p>22 Q. Did you have any difficulty accessing those -- the</p> <p>23 tranche of documents?</p> <p>24 A. No, I did not. But -- yeah. I'm sorry. Go ahead.</p> <p>25 Q. You had full opportunity to review all the documents</p> | <p style="text-align: right;">Page 157</p> <p>1 A. I'm saying that I looked at all of the documents. I</p> <p>2 read some of them very thoroughly, some of them more</p> <p>3 than once, and --</p> <p>4 Q. So you've looked at -- I want to make sure I</p> <p>5 understand. You've looked at every document that has</p> <p>6 been provided to you?</p> <p>7 A. I believe so. But I, again -- you know, it's possible</p> <p>8 that I missed one. I have a -- I have a bunch of</p> <p>9 files of documents and I looked at most of them. What</p> <p>10 I --</p> <p>11 Q. Dr. Finkelman, just --</p> <p>12 A. I can go -- I can go through the list of documents</p> <p>13 that I looked at if you'd like.</p> <p>14 Q. Please do. Please do.</p> <p>15 A. Okay. So I'm looking -- I am looking right now at</p> <p>16 depositions, and I read two depositions by Eid, one by</p> <p>17 Chadwell, Jackson, Camaj, Baker, and Robichaud. If</p> <p>18 there was another deposition, I'm not remembering</p> <p>19 reading it and I don't know that I had it. Okay? I</p> <p>20 looked at Ms. Camaj's report to her supervisor,</p> <p>21 Mr. Eid's report to the provost, the Promotion</p> <p>22 Committee. I looked at -- I looked at the Promotion</p> <p>23 Committee file, which is -- which is one of the</p> <p>24 exhibits in -- in one of the depositions. I looked at</p> <p>25 the Professionalism Committee file, which is I believe</p> |

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| <p style="text-align: right;">Page 166</p> <p>1 that he could be dismissed. Does that affect your 2 opinion about whether or not Ms. Camaj committed a 3 constitutional violation by failing to give him notice 4 that he could be dismissed?</p> <p>5 A. Well, I think it probably does in the context that she 6 is the one who's interviewing him and she is the one 7 who is urging him to essentially confess to something 8 without telling him exactly what it is he's confessing 9 to, and if -- if he -- and -- and given what I would 10 argue is a sort of byzantine process of various people 11 and various committees, I don't think it's due process 12 for -- for him to be interrogated in this way and told 13 to make a statement without knowledge of what the 14 consequences might be.</p> <p>15 Q. Dr. Finkelman, you are now conflating a bunch of 16 different due process components. I am just talking 17 about this one sentence about him not being given 18 notice that he could be dismissed from medical school. 19 So let's limit ourselves to that component of the due 20 process analysis. Can we agree on that for just this 21 moment?</p> <p>22 A. Sure.</p> <p>23 Q. Okay. Assume in my hypothetical Mr. Eid already has 24 notice that he could be dismissed from medical school. 25 Are you testifying here right now that the due process</p> | <p style="text-align: right;">Page 168</p> <p>1 somebody who is actually in authority in the process. 2 So I would say unless the information is conveyed in a 3 formal authoritative way by somebody who is in the 4 system of investigating and -- and adjudicating this, 5 that he hasn't actually been given notice.</p> <p>6 Q. So it's irrelevant to your opinion as an expert that 7 the medical school handbook notifies students that 8 they could be dismissed from medical school for 9 breaches of the standards of professionalism?</p> <p>10 A. I think that is not notice in this case.</p> <p>11 Q. Is it notice in any case?</p> <p>12 A. It's -- it's notice in a very, very vague way. 13 Mr. Eid is being asked to essentially write a 14 confession, and that's -- and he doesn't actually know 15 what he has been -- he's being investigated for, but 16 he's asking -- he's being asked to confess to 17 something he hasn't been asked to -- where he doesn't 18 have the information, and the fact that in the 19 handbook it says professionalism, I don't know, maybe 20 you know, maybe you can send me how professionalism is 21 defined and how the medical school has interpreted 22 professionalism and applied it in this way. As 23 Ms. Camaj notes, students don't read every piece of 24 the handbook. I think that's pretty well-known. 25 Q. Do you know whether or not Mr. Eid read the medical</p> |
| <p style="text-align: right;">Page 167</p> <p>1 clause requires him be given notice again prior to 2 meeting with Ms. Camaj?</p> <p>3 A. May I ask you to clarify what you mean by notice?</p> <p>4 Q. He is told that if he -- he could be dismissed from 5 medical school.</p> <p>6 A. Okay. So you're not talking about something that 7 might be in some handbook or some medical school 8 rules. You are talking about somebody in authority 9 has told him that you might be dismissed and that 10 person is in an authoritative position in part of the 11 process rather than say a professor who might say, you 12 know, you could be dismissed?</p> <p>13 Q. You are making a distinction between something being 14 in a handbook or medical school rules and somebody in 15 authority telling him that. Why do you make that 16 distinction?</p> <p>17 A. Well, because -- because you are saying if he has been 18 told. I interpret being told as a formal -- a formal 19 conveyance of information from someone in authority. 20 So, for example, if Mr. Eid got this and went to his 21 favorite med school professor and said, you know, how 22 do I deal with this and the professor said, well, you 23 know, you could be expelled for this, you've gotta be 24 careful, that's quite different from Vice -- Vice Dean 25 Baker telling him or Dr. Jackson telling him or -- or</p> | <p style="text-align: right;">Page 169</p> <p>1 school handbook in this case?</p> <p>2 A. I have no idea.</p> <p>3 Q. Do you know whether or not he read any of the 4 committee bylaws?</p> <p>5 A. I have no idea.</p> <p>6 Q. Do you know whether or not he read the student code of 7 conduct?</p> <p>8 A. He seems to have because he emailed Ms. Camaj and 9 asked for specific information that he said he was 10 entitled to in the student code of conduct, and she 11 did not, as best I can tell from the record, even 12 respond to that email, much less give him the 13 information, and if you would look on my -- on my 14 expert report, I think it was in Paragraph --</p> <p>15 Q. I'm familiar with that aspect of your report. Thank 16 you.</p> <p>17 A. We point that out.</p> <p>18 Q. Thank you. You state in Paragraph 57 that 19 Ms. Camaj --</p> <p>20 A. Is that five seven or six seven?</p> <p>21 Q. Five seven.</p> <p>22 A. Five seven. Okay.</p> <p>23 Q. You state in Paragraph 57 that Camaj often made a 24 determination on the spot and asked students to agree, 25 putting the student in an unconstitutional spot.</p> |

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| <p style="text-align: right;">Page 190</p> <p>1 case. In this particular numbered paragraph.</p> <p>2 Q. Okay. You state in Paragraph 60 of your report that</p> <p>3 Mr. Eid offered to write an apology "but it appears</p> <p>4 [she] did not want that to happen."</p> <p>5 A. Yes.</p> <p>6 Q. You cite Mr. Eid's deposition at 148, 149. We've</p> <p>7 already been over that. Correct?</p> <p>8 A. Um-hmm.</p> <p>9 Q. Nowhere in those two pages that you just read did it</p> <p>10 ever suggest for Mr. Eid that Ms. Camaj did not want</p> <p>11 him to write an apology; correct?</p> <p>12 A. I would have to go and reread them again.</p> <p>13 Q. Feel free to do so.</p> <p>14 A. Pardon?</p> <p>15 Q. Feel free to do so.</p> <p>16 A. And, you know, again, those two pages -- all I can say</p> <p>17 is that she also doesn't say in these two pages</p> <p>18 that --</p> <p>19 Q. You're referring to the Eid deposition?</p> <p>20 A. You're talking about Page 109 and 110 in Camaj; right?</p> <p>21 Q. No. I'm referring to Mr. Eid's deposition at Page 148</p> <p>22 and 149. It's the citation that you provide in your</p> <p>23 expert report for this assertion of fact. Point to me</p> <p>24 where in there it suggests that Camaj did not want</p> <p>25 that to happen.</p> | <p style="text-align: right;">Page 192</p> <p>1 maybe this would move a little smoother. Okay? But</p> <p>2 let me --</p> <p>3 Q. Well, go ahead and move this a little bit smoother.</p> <p>4 Why don't you open up --</p> <p>5 A. Let me rephrase my answer if I may. I am concluding</p> <p>6 from the fact that Mr. Eid offered to write the</p> <p>7 apology letter and Ms. Camaj did not accept that</p> <p>8 offer, say anything about that offer, try to convey</p> <p>9 the apology letter to the complainant, that this is</p> <p>10 because Ms. Camaj did not, in fact, want him to write</p> <p>11 an apology letter, and this is based on the fact that</p> <p>12 in the other discussions of his statement Ms. Camaj</p> <p>13 said when he asked her should I include this in the</p> <p>14 statement, she said affirmatively yes, but when he</p> <p>15 says should I write an apology letter, there is no</p> <p>16 response, and that is because she does not want him to</p> <p>17 write an apology letter. Yes.</p> <p>18 Q. Did you take the same approach to drawing the other</p> <p>19 conclusions that you reached in your report as the one</p> <p>20 you just described right there?</p> <p>21 A. I don't know what the same approach would be to the</p> <p>22 other conclusions. My report has many conclusions and</p> <p>23 many approaches. If you've got a specific -- if</p> <p>24 you've got a specific issue, please ask me the</p> <p>25 specific issue so I can answer it.</p> |
| <p style="text-align: right;">Page 191</p> <p>1 A. "Did you submit a" -- well, the question is, "You</p> <p>2 wanted to submit one, though, because what you had</p> <p>3 done did not sit well with your conscience; correct?"</p> <p>4 "I offered to write an apology letter."</p> <p>5 Again, my assumption from this, my</p> <p>6 conclusion from the evidence that is here that Mr. Eid</p> <p>7 offered to write an apology letter and Ms. Camaj did</p> <p>8 not say absolutely write an apology letter, just as</p> <p>9 she said at another point put this particular</p> <p>10 information in the statement. She didn't say yes, I</p> <p>11 want to take you up on that offer to write an apology</p> <p>12 letter, that would be a good idea, that would be</p> <p>13 useful, and so I am saying that it appears that</p> <p>14 Ms. Camaj did not want him to write the apology</p> <p>15 letter. It doesn't say that I know for a fact</p> <p>16 because, again, this is only an appearance.</p> <p>17 Q. Okay. So you're speculating? You're assuming?</p> <p>18 A. I'm not assuming. I'm making an assumption that is</p> <p>19 not assuming on -- if you'll excuse me, I like that</p> <p>20 look. It's a very wonderful look. Right?</p> <p>21 Q. Well, you say you're not assuming and then you said</p> <p>22 you're making an assumption. Those are the same word,</p> <p>23 Doctor. Excuse me for being shocked.</p> <p>24 A. Okay. But you know something? If you'd let me finish</p> <p>25 my answer instead of, you know, doing your acting,</p> | <p style="text-align: right;">Page 193</p> <p>1 Q. I'm asking you if this is -- if you approached all the</p> <p>2 assertions and conclusions that you make in this</p> <p>3 report. I'm wondering if you followed the same</p> <p>4 approach and methodology in forming each one.</p> <p>5 General --</p> <p>6 MR. FLORES: Objection. Objection. The</p> <p>7 witness has already said that he did not.</p> <p>8 BY MR. PORTER:</p> <p>9 Q. Okay. Please open up Ms. Camaj's deposition at</p> <p>10 Page 114. It's the bottom two lines.</p> <p>11 A. 114. Okay.</p> <p>12 Q. Please read those two lines.</p> <p>13 A. "... he asked if he could include an apology letter.</p> <p>14 I said absolutely you can include that. I informed</p> <p>15 him he can provide" --</p> <p>16 Q. You can stop right there.</p> <p>17 A. All right. In that case, thank you for correcting me.</p> <p>18 I am wrong. Okay? I made a mistake. I missed it. I</p> <p>19 missed a sentence that Ms. Camaj said. I will say,</p> <p>20 however, that it still strikes me as odd that she did</p> <p>21 not pursue the apology letter the way she pursued the</p> <p>22 statement, but I --</p> <p>23 Q. Let's take a look at --</p> <p>24 A. I concede your point, Mr. Porter.</p> <p>25 Q. You find that odd. All right. So then let's open up</p> |

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| <p style="text-align: right;">Page 194</p> <p>1 the Eid/Camaj correspondence which we've already 2 been -- I've already sent you. 3 A. Which -- which -- 4 Q. It's the last page of the PDF. It's Bates 219. 5 A. Wait. I'm sorry. I have a ton of PDFs here. 6 Q. Let me resend it to you to make it easy. 7 A. I just want to know which one it is. 8 Q. The very first page is the letter from Ms. Camaj to 9 Mr. -- 10 A. What is the title of the PDF? 11 Q. Eid - Camaj Correspondence. 12 A. Eid - Camaj Correspondence. And you sent that to me 13 earlier? Then let me open it up because I am not 14 seeing that right on my screen. So let me -- oh, wait 15 a minute. Here it is right here. Hold on a second. 16 I think I found the email you sent to me. Eid - Camaj 17 PDF. 18 Q. You just testified just a moment ago that you, quote, 19 you find that odd that she didn't pursue the apology 20 letter. 21 A. Yes. 22 Q. Take a look at the last page of that PDF. 23 A. The very last page. Okay. I will. 24 Q. It's an email from Ms. Camaj to Mr. Eid; is that 25 right?</p> | <p style="text-align: right;">Page 196</p> <p>1 his behavior? 2 A. Well, we talked about the "nature of" language a while 3 ago, and, as I said, I do not believe he was informed 4 of the accusation. He probably was informed in a 5 general sense of the nature. 6 Q. Okay. So let's distinguish between those two because 7 I feel like you are. You are making a distinction 8 between the nature of the allegations and the actual 9 complaint that Ms. Roe made; correct? 10 A. And so I wrote in Paragraph 59 that he did not have 11 the full nature of the complaint, and, as I said, 12 perhaps the word "nature" is misleading here. He did 13 not have the full content of the complaint. 14 Q. And I'm asking you a direct question. Are you 15 referring to Ms. Roe's complaint, the document that 16 she submitted raising concerns about his behavior? 17 A. Yeah. 18 Q. Do you know whether or not he ever received that 19 document? 20 A. I do not know if he received it. I suspect he has it 21 now in this litigation. 22 Q. Do you know whether or not he received it as part of 23 the medical school process prior to his dismissal? 24 A. I do not, I am sorry to say. 25 Q. Do you know whether or not he ever saw the underlying</p> |
| <p style="text-align: right;">Page 195</p> <p>1 A. Yeah. 2 Q. What is the second sentence of that email? 3 A. "In the last paragraph of the letter, I welcome the 4 opportunity to write an apology, as what took place 5 does not sit well with my conscience." 6 Q. No, no. That's Mr. Eid's email. If you go up to the 7 top, Ms. Camaj's email, this is the final 8 correspondence between them. What does she say? 9 A. All right. She says that she will notify the 10 committee. And so I can only say that in this piece 11 of my expert report I overlooked evidence and I am 12 incorrect. That happens. It happens when you're 13 writing something in a hurry and you haven't had a 14 chance to fact check every -- you know, go back and do 15 multiple checkings of everything. And so it's clear 16 that she does not seem to be opposed to him writing 17 it. 18 Q. Does that influence in any way your opinion that -- of 19 Ms. Camaj's role in this case? 20 A. It might, yeah. It -- I'll leave it at that unless 21 you want to ask a follow-up question. 22 Q. No. That's fine. I will ask a follow-up if I feel 23 it's necessary. 24 Do you know whether Mr. Eid was ever 25 informed of the nature of the allegations concerning</p> | <p style="text-align: right;">Page 197</p> <p>1 materials that were provided by Ms. Roe in connection 2 with her complaint regarding his behavior? 3 A. My understanding is he received some of this. Whether 4 he received all of this I do not know. 5 Q. And do you know whether or not he ever had an 6 opportunity for a hearing regarding the allegations of 7 his concerning behavior? 8 A. That would depend on how you define a hearing. 9 Q. Okay. You agree with me that he appeared before the 10 Professionalism Committee; correct? 11 A. I do. 12 Q. You agree with me that he appeared before the 13 Promotions Committee? 14 A. I couldn't hear what you just said. You faded out. 15 Q. Do you agree with me that he also appeared before the 16 Promotions Committee? 17 A. I do. 18 Q. And do you also agree with me that he was given an 19 opportunity to provide an additional statement in an 20 appeal back to the Promotions Committee? 21 A. I do. 22 Q. Okay. In Paragraph 72 you say, "It is somewhat 23 shocking that for such an important matter the 24 [Promotions] committee kept no minutes or records of 25 its proceedings." Do you see that?</p> |

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| <p style="text-align: right;">Page 230</p> <p>1 please. Okay?</p> <p>2 A. All right.</p> <p>3 Q. I'm just asking you a hypothetical question.</p> <p>4 A. I think I've answered it.</p> <p>5 Q. Thank you. Other than Ms. Camaj's deposition, what</p> <p>6 other documents did you review before forming this</p> <p>7 conclusion that Wayne State University created a</p> <p>8 special -- secretly created a special procedure to</p> <p>9 investigate Mr. Eid, deviating from its standard</p> <p>10 investigative process?</p> <p>11 A. I looked at the deposition of Dr. Chadwell and</p> <p>12 Exhibit B in that, which was email correspondence with</p> <p>13 Ms. Robichaud who indicated before there was any</p> <p>14 investigation that Ms. Robichaud thought that Mr. Eid</p> <p>15 was guilty of various things, speculated that he</p> <p>16 preyed on other students and that something had to be</p> <p>17 done in this, and Ms. -- and Dr. Chadwell said agree,</p> <p>18 and that --</p> <p>19 Q. That's it?</p> <p>20 A. There are -- there are discussions of a -- of another</p> <p>21 committee, which is the Intervention Committee,</p> <p>22 throughout the depositions. It is not clear to me</p> <p>23 what the Intervention Committee did, what it was</p> <p>24 charged with doing, what it does, and therefore I -- I</p> <p>25 can't have a full handle on what this Intervention</p> | <p style="text-align: right;">Page 232</p> <p>1 Q. Dr. Finkelman, I just want to make sure --</p> <p>2 A. No. I'm answering your question.</p> <p>3 Q. Please stop. I want to make sure I understand what</p> <p>4 you just said. Did you just reference a case</p> <p>5 involving the issue being whether or not somebody was</p> <p>6 brought before a judge too soon?</p> <p>7 A. No. Not soon enough.</p> <p>8 Q. Not soon enough. Okay. Please proceed. Please</p> <p>9 proceed.</p> <p>10 A. In the San Bernardino County case, and I can get you</p> <p>11 the full cite if you want, the -- the defendant -- the</p> <p>12 person appealing the case was basically held in jail</p> <p>13 for five days before he was brought before a judge,</p> <p>14 and for a variety of reasons the court upheld this,</p> <p>15 but in a -- I think a very powerful dissent Justice</p> <p>16 Scalia argued that holding him in jail for any more</p> <p>17 than 20 -- than 48 hours was simply a fishing</p> <p>18 expedition to find something to charge him with, and</p> <p>19 it strikes me that this is kind of analogous to Wayne</p> <p>20 State University receiving a complaint and rather than</p> <p>21 dealing with it right away and rather than going to</p> <p>22 Mr. Eid right away and saying we have this complaint,</p> <p>23 let's deal with it, within the ten days specified what</p> <p>24 the school is doing is sitting on the complaint for a</p> <p>25 month having this Intervention Committee and I don't</p> |
| <p style="text-align: right;">Page 231</p> <p>1 Committee does, but it does seem to me that -- there's</p> <p>2 also the chronology of events. That is to say,</p> <p>3 this -- this complaint was received I believe on</p> <p>4 October 29, and under the university rules, the</p> <p>5 university has to begin to process the complaint</p> <p>6 against the individual within ten days, and the</p> <p>7 university, in fact, waits almost a full month because</p> <p>8 Mr. Eid does not come before Ms. Camaj I believe until</p> <p>9 November 30th, so it seems to me that right there is a</p> <p>10 substantial deviation from the university rules with</p> <p>11 regard to student conduct that rather than doing this</p> <p>12 within ten days they wait almost a month.</p> <p>13 My sense from reading many cases involving</p> <p>14 due process -- and I can think of one, for instance.</p> <p>15 There's a California case that went to the Supreme</p> <p>16 Court involving how quickly a -- the prosecutors need</p> <p>17 to bring somebody before a court for a preliminary</p> <p>18 hearing. In that case, in a wonderful dissent,</p> <p>19 Justice Scalia argued that keeping anybody in jail for</p> <p>20 more than 24 hours before bringing them before a court</p> <p>21 was a fishing expedition, and this goes very much to</p> <p>22 very long -- I'm sorry. I don't know -- I don't</p> <p>23 remember the name of the case. San Bernardino</p> <p>24 County -- somebody versus San Bernardino County. I</p> <p>25 can get you the citation --</p> | <p style="text-align: right;">Page 233</p> <p>1 know what else it's doing. And the very fact that</p> <p>2 Associate Dean Chadwell and Ms. Robichaud are talking</p> <p>3 about his guilt on November 4th --</p> <p>4 Q. You've already said that. You've already said that.</p> <p>5 A. -- the investigation is -- strikes me as -- as -- as</p> <p>6 fundamental --</p> <p>7 Q. Dr. Finkelman, you are now repeating yourself. You</p> <p>8 are now repeating yourself.</p> <p>9 A. I'm sorry.</p> <p>10 MR. PORTER: Bob, you know, I retract my</p> <p>11 estimate of being out of here by 6:00. We're going to</p> <p>12 be here a little bit longer. I think you can</p> <p>13 understand why. But I am going to press ahead here.</p> <p>14 BY MR. PORTER:</p> <p>15 Q. Does that complete your answer about what materials</p> <p>16 you've looked at in order to form your conclusion that</p> <p>17 Wayne State University deviated from its standard</p> <p>18 practices and secretly created a special process just</p> <p>19 for Mr. Eid?</p> <p>20 A. Yes.</p> <p>21 Q. Did you review the medical school handbook before</p> <p>22 forming that opinion?</p> <p>23 A. I did not.</p> <p>24 Q. And you didn't also review the Professionalism</p> <p>25 Committee bylaws; isn't that true?</p> |

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| <p style="text-align: right;">Page 234</p> <p>1 A. I don't believe I did.</p> <p>2 Q. Did you review the Promotions Committee bylaws?</p> <p>3 A. I don't believe I did.</p> <p>4 Q. You've reviewed all of the depositions in this case;</p> <p>5 correct?</p> <p>6 A. I did.</p> <p>7 Q. So you've read the testimony of Dr. Chadwell who</p> <p>8 explained that Mr. Eid was processed through the</p> <p>9 Professionalism and Promotions Committee process at</p> <p>10 the School of Medicine; isn't that correct?</p> <p>11 A. That's what she said, yes.</p> <p>12 Q. Do you have any reason to doubt that?</p> <p>13 A. No. No. No. I'm agreeing with it.</p> <p>14 Q. So if that's true, then why did you not read the Wayne</p> <p>15 State School of Medicine Handbook setting out the</p> <p>16 procedures in place for that process as well as the</p> <p>17 Professionalism and Promotions Committee bylaws which</p> <p>18 also lay out the process for that procedure?</p> <p>19 A. The reason I didn't read it was, first, because I have</p> <p>20 something of a lack of time, but, secondly, because</p> <p>21 this case did not go to the medical school. It went</p> <p>22 to Ms. Camaj. And so if the case went to Ms. Camaj</p> <p>23 first and it went to the dean of students at the</p> <p>24 university, who Ms. Camaj works for, that seems to be</p> <p>25 where the case went, but that there was a --</p> | <p style="text-align: right;">Page 236</p> <p>1 Q. -- who explained that Mr. Eid was processed through</p> <p>2 the Professionalism and Promotions Committee process</p> <p>3 at the School of Medicine, and I asked if you had any</p> <p>4 reason to doubt her testimony and you said, "No. No.</p> <p>5 No. I'm agreeing with it." So you agree that this</p> <p>6 was processed through the medical school's</p> <p>7 Professionalism and Promotions Committee procedure?</p> <p>8 A. After Ms. Camaj had the case.</p> <p>9 Q. Okay. So then I asked why didn't you read the School</p> <p>10 of Medicine Handbook and the Promotions Committee and</p> <p>11 Professionalism Committee bylaws knowing that fact?</p> <p>12 A. And I said because while the -- and, again, I suppose</p> <p>13 it's a question of what you mean by process. As I</p> <p>14 read Ms. Camaj's -- sorry. As I read Dr. Chadwell's</p> <p>15 deposition, the case comes to the medical school and</p> <p>16 then it is sent to the dean of students of the</p> <p>17 university, which would be a higher level of scrutiny</p> <p>18 because it's the dean of students for the entire</p> <p>19 university than the actions within a particular</p> <p>20 college, and so it seems to me that it begins,</p> <p>21 whether -- what door it comes through is not as</p> <p>22 important as where it is sent, and if it comes through</p> <p>23 the door of the medical school and the medical school</p> <p>24 says, well, we are sending this to the -- to the dean</p> <p>25 of students, and Ms. Camaj then handles it and then</p> |
| <p style="text-align: right;">Page 235</p> <p>1 essentially a 30-day lapse between the time the</p> <p>2 complaint was made and the time it went to Ms. Camaj.</p> <p>3 Q. Okay. So if it went to the School of Medicine first</p> <p>4 and then to Ms. Camaj, then your expert opinion would</p> <p>5 change; correct?</p> <p>6 A. No. Because if it went to the --</p> <p>7 Q. Okay. If the answer is no, that's fine. No.</p> <p>8 A. Okay. I'll just say no.</p> <p>9 Q. You need to listen to the question, please. This</p> <p>10 is . . .</p> <p>11 Would you agree with me that if this case</p> <p>12 first went to the medical school and then to Ms. Camaj</p> <p>13 that the procedures that applied in Mr. Eid's case</p> <p>14 would be covered by the School of Medicine's handbook</p> <p>15 and the bylaws of the Promotions and Professionalism</p> <p>16 Committees?</p> <p>17 A. I don't think so.</p> <p>18 Q. You just answered a moment ago that you didn't read</p> <p>19 those three documents because this case did not go to</p> <p>20 the medical school.</p> <p>21 A. Ask that question one more time that I responded to I</p> <p>22 don't think so.</p> <p>23 Q. I've asked you -- I asked you if you've read the</p> <p>24 deposition of Margaret Chadwell, --</p> <p>25 A. I did.</p> | <p style="text-align: right;">Page 237</p> <p>1 she sends it back to the medical school where the</p> <p>2 medical school processes it. That is my understanding</p> <p>3 of the process. It doesn't begin with the</p> <p>4 Professionalism. It begins with the medical school</p> <p>5 sending this over to Ms. Camaj, but that there is this</p> <p>6 one-month period where we don't know what's happening.</p> <p>7 Q. Okay. But you also agree with me, though, that</p> <p>8 Ms. Camaj testified that what she did in Mr. Eid's</p> <p>9 case was not what she does normally in the dean of</p> <p>10 students' office as a student conduct officer;</p> <p>11 correct?</p> <p>12 A. She said that it's not what she normally does.</p> <p>13 Q. Correct. Right.</p> <p>14 A. Right.</p> <p>15 Q. So this was not processed or sent to her in her</p> <p>16 capacity as student conduct officer in the dean of</p> <p>17 students' office; correct?</p> <p>18 A. I do not know if that's correct.</p> <p>19 Q. Ms. Camaj just testified to that and you've just</p> <p>20 acknowledged that she testified to it.</p> <p>21 A. No. Ms. Camaj testified that she didn't do what she</p> <p>22 normally does.</p> <p>23 Q. Okay. If it is true, Dr. Finkelman, that Ms. Camaj</p> <p>24 testifies that her involvement in this case was not as</p> <p>25 a student conduct officer but as simply a person who</p> |

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| <p style="text-align: right;">Page 254</p> <p>1 opinion, draw any conclusion based on one of -- that</p> <p>2 fact with any reasonable degree of certainty?</p> <p>3 A. Only -- only -- only if you are looking at two</p> <p>4 specific statements and nothing else, no other part of</p> <p>5 the deposition, no other facts in evidence, no other</p> <p>6 documentation. So if, for example, Ms. Camaj says</p> <p>7 something and Mr. Eid says something else and there is</p> <p>8 nothing else about it, yes. But if there's other</p> <p>9 evidence, then we have -- even if it's not directly on</p> <p>10 this point, we have to take the totality of the</p> <p>11 evidence.</p> <p>12 Q. I understand. All right. Thank you. And you agree</p> <p>13 that Mr. Eid was given the opportunity to appeal the</p> <p>14 Promotions Committee decision to the provost; correct?</p> <p>15 A. I agree that he appealed the decision to the provost</p> <p>16 and that, again, it is -- the record seems murky about</p> <p>17 whether he had to make a choice between resigning from</p> <p>18 the medical school or appealing to the provost, that</p> <p>19 he could not appeal to the provost and then resign</p> <p>20 from the medical school. So if that's -- so -- so</p> <p>21 there's an ability to appeal, but it's constricted by</p> <p>22 a cost if you do that.</p> <p>23 Q. And how does that factor into your analysis about --</p> <p>24 if that were true, how does that factor into your</p> <p>25 analysis about whether or not the -- Mr. Eid was</p> | <p style="text-align: right;">Page 256</p> <p>1 that's the case, assuming that Dr. Baker told him what</p> <p>2 Mr. Eid says Dr. Baker told him, why Dr. Baker would</p> <p>3 have told him that.</p> <p>4 Q. Have you ever been asked to be a due process expert in</p> <p>5 a civil case before?</p> <p>6 MR. FLORES: I don't think he heard you.</p> <p>7 A. I did hear him. I'm trying to remember. I do not</p> <p>8 think so.</p> <p>9 BY MR. PORTER:</p> <p>10 Q. And you have never provided expert testimony in a</p> <p>11 court of law on due process; is that correct?</p> <p>12 A. Well, I have to the extent that the due process clause</p> <p>13 incorporates the Bill of Rights for the states.</p> <p>14 Q. And you've never been qualified as an expert by any</p> <p>15 court; is that correct?</p> <p>16 A. I was qualified by the Middle District of Alabama I</p> <p>17 assume since I testified. I was qualified in the</p> <p>18 San Francisco Superior Court since I testified, and I</p> <p>19 was assume qualified in the Middle District of</p> <p>20 Pennsylvania since the chief judge quoted my expert</p> <p>21 report in his summary judgment opinion.</p> <p>22 Q. Did you undergo what is known as a Daubert hearing in</p> <p>23 any of those cases you just mentioned?</p> <p>24 A. I did not -- no. I did not have a Daubert hearing.</p> <p>25 Q. Did anybody assist you in preparing your report?</p> |
| <p style="text-align: right;">Page 255</p> <p>1 denied due process?</p> <p>2 A. Because if the institution says if you do not appeal</p> <p>3 this to the next level, which is central</p> <p>4 administration of the university, we will allow you</p> <p>5 to -- we will consider your appeal and if we deny it,</p> <p>6 you have a right to resign from the medical school.</p> <p>7 But if you avail yourself of the ability to appeal to</p> <p>8 the next level of the court, then we will not allow</p> <p>9 you to resign from the medical school.</p> <p>10 Q. You agree with me, though, that that line of reasoning</p> <p>11 depends on the premise that Mr. Eid had the right to</p> <p>12 withdraw from medical school?</p> <p>13 A. Again, that's the -- that's in the depositions.</p> <p>14 Q. You just explained to me the rationale behind your</p> <p>15 expert opinion for why it's a due process violation</p> <p>16 for the school to tell Mr. Eid that if he appeals to</p> <p>17 the provost office he can no longer withdraw from the</p> <p>18 medical school. I'm asking you isn't it true that</p> <p>19 that line of reasoning relies on the premise that he</p> <p>20 had a right to withdraw from the medical school?</p> <p>21 A. Yes.</p> <p>22 Q. And so if he did not have a right to withdraw from the</p> <p>23 medical school, that line of reasoning falls away;</p> <p>24 correct?</p> <p>25 A. I would assume it does, and then I would wonder if</p> | <p style="text-align: right;">Page 257</p> <p>1 A. In what way?</p> <p>2 Q. Did they provide substantive input?</p> <p>3 A. No.</p> <p>4 Q. Did anybody provide formatting assistance?</p> <p>5 A. No. I formatted it myself.</p> <p>6 Q. Did anybody provide any other types of assistance with</p> <p>7 your report?</p> <p>8 A. Mr. Flores picked up a few typos in the draft I sent</p> <p>9 him.</p> <p>10 Q. Did he review your report before you submitted it to</p> <p>11 the defendants in this case?</p> <p>12 A. Yes.</p> <p>13 Q. Did he provide you any feedback on the content of the</p> <p>14 report?</p> <p>15 A. He did not take me to -- he did not suggest I take</p> <p>16 anything out of it, if that's what you mean.</p> <p>17 Q. Did he suggest that you add anything to the report?</p> <p>18 A. He asked me to elaborate on a couple of points and I</p> <p>19 did.</p> <p>20 Q. What points?</p> <p>21 A. I actually don't remember. And I'm not trying to be</p> <p>22 evasive. I really don't remember.</p> <p>23 MR. FLORES: That's privileged information.</p> <p>24 David knows that.</p> <p>25 MR. PORTER: What privilege are you</p> |

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| <p style="text-align: right;">Page 258</p> <p>1 referring to?</p> <p>2 MR. FLORES: The work product privilege.</p> <p>3 MR. PORTER: That is not work product</p> <p>4 privilege, Mr. Flores.</p> <p>5 MR. FLORES: My conversations with my</p> <p>6 expert are privileged.</p> <p>7 BY MR. PORTER:</p> <p>8 Q. Do you have any drafts of your report?</p> <p>9 A. I do not.</p> <p>10 Q. Does this report represent your best work?</p> <p>11 A. This report represents the best work I can do on this</p> <p>12 case in the time constraints allowed to provide this</p> <p>13 report in writing. I worked very hard on this report.</p> <p>14 Put in many hours.</p> <p>15 Q. Are you willing to stake your professional reputation</p> <p>16 on this report?</p> <p>17 A. My professional reputation? My professional</p> <p>18 reputation is usually based on things which are</p> <p>19 published, that are published --</p> <p>20 MR. FLORES: Dr. Finkelman, can you</p> <p>21 speak -- I can't hear you.</p> <p>22 A. I'm sorry. My professional reputation is based on</p> <p>23 things that I've published. Publication process is</p> <p>24 much longer, much more complicated. There are, for</p> <p>25 example, typos in this report. I would not want my</p> | <p style="text-align: right;">Page 260</p> <p>1 part of your professional service, are you willing to</p> <p>2 stake your reputation on the written work product that</p> <p>3 you have submitted in connection with this case?</p> <p>4 A. And my answer to you is my reputation is much larger</p> <p>5 than any single thing that I have ever produced or</p> <p>6 written, just as I would assume your professional</p> <p>7 reputation is not based on whether you won any single</p> <p>8 event within your career.</p> <p>9 Q. Are you proud of the work product that you've put into</p> <p>10 this report?</p> <p>11 A. Yes.</p> <p>12 Q. When formulating your opinions in this case, did you</p> <p>13 do any additional research outside of using</p> <p>14 HeinOnline?</p> <p>15 A. Well, I told you that I reread portions of Leonard</p> <p>16 Levy's prize winning book on the Fifth Amendment. I</p> <p>17 looked at a number of other cases.</p> <p>18 Q. Did you look at any cases that are not cited in your</p> <p>19 report?</p> <p>20 A. I honestly can't remember. I looked at a -- I looked</p> <p>21 at a case -- yeah. I looked at a case involving</p> <p>22 students, and I can't remember the name of it. I</p> <p>23 would have to look it up. High school students who</p> <p>24 were expelled from a school and the court ruled that</p> <p>25 they had been denied their due process --</p> |
| <p style="text-align: right;">Page 259</p> <p>1 professional reputation to be based on the fact that</p> <p>2 in attempting to put this report together in a</p> <p>3 relatively short time that I have typos in it. You</p> <p>4 know, you have pointed out that I have made an error</p> <p>5 in one of the pieces of the depositions that I have</p> <p>6 used. I certainly would not want my professional</p> <p>7 reputation based on the fact that I had an error,</p> <p>8 which is why in the academic world things are reviewed</p> <p>9 and it's why, by the way, that briefs are reviewed and</p> <p>10 read by many, many people.</p> <p>11 BY MR. PORTER:</p> <p>12 Q. So is that a yes or a no?</p> <p>13 A. That's an answer.</p> <p>14 Q. Will you stake your professional reputation on the</p> <p>15 written report that you've prepared and submitted in</p> <p>16 this case? Dr. Finkelman, you hold yourself out to</p> <p>17 members of your profession as an expert in a variety</p> <p>18 of fields, do you not?</p> <p>19 A. That's correct.</p> <p>20 Q. Okay. You laud yourself in your CV as the expert</p> <p>21 witness in a number of cases. Okay? So this is part</p> <p>22 of your expert reputation that we're discussing right</p> <p>23 now.</p> <p>24 A. And in that context --</p> <p>25 Q. My question to you, Dr. Finkelman, is, because this is</p> | <p style="text-align: right;">Page 261</p> <p>1 Q. Are you referring to Roth?</p> <p>2 A. Yes.</p> <p>3 Q. And --</p> <p>4 A. But I didn't put that in because --</p> <p>5 Q. You agree with me that you didn't cite Roth in your</p> <p>6 report; correct?</p> <p>7 A. I did not.</p> <p>8 Q. Do you think that Roth is irrelevant to the facts of</p> <p>9 this case?</p> <p>10 A. No. I think there's simply only so much time one has,</p> <p>11 and I looked at Roth and said that's interesting and</p> <p>12 then I didn't get back to it.</p> <p>13 Q. You knew from reading the depositions, did you not,</p> <p>14 that Wayne State University considered this to be a</p> <p>15 professionalism issue; correct?</p> <p>16 A. I do.</p> <p>17 Q. And you knew that the School of Medicine has a</p> <p>18 separate procedure involving the process of</p> <p>19 professionalism issues; correct?</p> <p>20 A. I do.</p> <p>21 Q. And you knew that this involved the medical school</p> <p>22 setting; is that correct?</p> <p>23 A. Yes, it is correct.</p> <p>24 Q. Knowing all that, did you do any research to determine</p> <p>25 whether or not there are special due process</p> |

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| <p style="text-align: right;">Page 262</p> <p>1 principles that apply to professionalism judgments</p> <p>2 made by medical school administrators?</p> <p>3 A. I did not.</p> <p>4 Q. Did you search out any other authorities that would</p> <p>5 contradict the position that Mr. Eid has taken in this</p> <p>6 case?</p> <p>7 A. I did not.</p> <p>8 Q. Did you try to?</p> <p>9 A. No.</p> <p>10 Q. So it sounds to me that you allowed the conclusion</p> <p>11 that Mr. Eid wanted to draw in this case to lead the</p> <p>12 presentation and the research of your report?</p> <p>13 A. No.</p> <p>14 Q. You just agreed that you didn't search out contrary</p> <p>15 authority; correct?</p> <p>16 A. Correct.</p> <p>17 Q. You didn't research additional materials outside of</p> <p>18 that was given to you by Mr. Eid; correct?</p> <p>19 A. Mr. Eid's counsel, yes.</p> <p>20 Q. And is that something you would normally do as a legal</p> <p>21 historian?</p> <p>22 MR. FLORES: I'm sorry. I didn't hear the</p> <p>23 last part of that question, David.</p> <p>24 BY MR. PORTER:</p> <p>25 Q. That approach that I just mentioned, not looking for</p> | <p style="text-align: right;">Page 264</p> <p>1 A. I did not have the time.</p> <p>2 MR. PORTER: Okay. If you will indulge me,</p> <p>3 I just need five minutes. I'm going to review my</p> <p>4 materials. I will be right back.</p> <p>5 (Recess taken at 6:06 p.m.)</p> <p>6 (Back on the record at 6:09 p.m.)</p> <p>7 MR. PORTER: So that's all the questions I</p> <p>8 have for you today.</p> <p>9 EXAMINATION</p> <p>10 BY MR. FLORES:</p> <p>11 Q. Dr. Finkelman, I have just a few.</p> <p>12 During the course of today's questioning by</p> <p>13 Mr. Porter, the issue of time, review, what you looked</p> <p>14 at, all of those issues were raised multiple times.</p> <p>15 Do you agree that there are three primary areas of</p> <p>16 concern when you're talking about procedural due</p> <p>17 process, the opportunity to be heard, the opportunity</p> <p>18 to present evidence, and the opportunity to confront</p> <p>19 the accuser or cross-examine? Do you agree with that?</p> <p>20 A. I would simply add the fourth one the opportunity to</p> <p>21 have the assistance of counsel.</p> <p>22 Q. In this case you've looked at a number of --</p> <p>23 A. I can't hear you. I'm sorry. You'll have to repeat</p> <p>24 it.</p> <p>25 Q. Have you --</p> |
| <p style="text-align: right;">Page 263</p> <p>1 contrary authority and not searching out additional</p> <p>2 materials that you already have, is that consistent</p> <p>3 with what you do as a legal historian?</p> <p>4 A. When I write academic history -- when I write academic</p> <p>5 legal history, I write scholarship in the law, I</p> <p>6 sometimes can spend as little as nine months and as</p> <p>7 much as eight years writing something, and so I try to</p> <p>8 look at everything available in all contexts. When I</p> <p>9 have something where I essentially have three weeks to</p> <p>10 write it, I work with what I have in the time frame</p> <p>11 that I have it.</p> <p>12 As -- as you implied at the very beginning</p> <p>13 of this deposition, and it works quite well, my time</p> <p>14 costs the client something and time constraints are</p> <p>15 limited, and while I was, you know, working as hard as</p> <p>16 I could and as fast as I could, there -- there's only</p> <p>17 so much time that one can put into a -- into writing</p> <p>18 an expert report, especially when there's a cost</p> <p>19 involved in writing it. So yeah, I didn't look at</p> <p>20 everything in the universe. By the way, I may decide</p> <p>21 to write a law review article on this and then I will.</p> <p>22 Q. You said you didn't look at everything in the</p> <p>23 universe. You didn't even try to look at anything</p> <p>24 outside of what was already provided to you by</p> <p>25 Mr. Eid's counsel?</p> | <p style="text-align: right;">Page 265</p> <p>1 MR. PORTER: I don't mean to cut you off.</p> <p>2 But it seemed --</p> <p>3 MR. FLORES: Let me see if they've charged.</p> <p>4 Give me a moment.</p> <p>5 BY MR. FLORES:</p> <p>6 Q. Okay. Can you hear me?</p> <p>7 A. I can hear you fine.</p> <p>8 Q. Okay. Good. Okay. So in reviewing the material that</p> <p>9 you did look at in preparation of your report, did you</p> <p>10 come across any information that my client had an</p> <p>11 opportunity to cross-examine his accuser?</p> <p>12 A. No. He never had any opportunity to cross-examine his</p> <p>13 accuser or, as best I can tell, to cross-examine</p> <p>14 anyone else who made any statements against him. And,</p> <p>15 by the way, it would be his accusers since the</p> <p>16 accusation appears to be both the mother of Ms. Roe</p> <p>17 and Ms. Roe herself, so it would be both accusers.</p> <p>18 Q. In preparation of your report, did you come across any</p> <p>19 information that led you to believe that Mr. Eid had</p> <p>20 received less than appropriate notice at one or more</p> <p>21 stages of the process that the School of Medicine or</p> <p>22 the university as a whole put him through?</p> <p>23 A. Yes. I believe he did not have notice in a variety of</p> <p>24 contexts.</p> <p>25 Q. Is there any question in your mind -- well, let me</p> |